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ABSTRACT

In 1970 the United States Supreme Court held in "Goldberg v. Kelly" that recipients of Aid to Families with Dependent Children (AFDC) had a constitutional right to an evidentiary hearing before a local welfare agency could terminate benefits. In order to determine the effects that the "Goldberg" requirements have had on the outcomes of AFDC appeals, a sample of 2000 hearing requests filed with the Wisconsin Department of Health and Social Services between 1965 and 1976 was examined. The data gathered showed a decrease in client success and an increase in hearing non-shows following the change in procedures. It also indicated that the present haphazard manner of attorney representation has not been helpful. However, the data also indicate that AFDC clients can become more effective adversaries if they are provided with adequate support and information about their claims. It can be concluded that if the goals desired by the courts and commentators are ever to be realized fully, further additions and supplements to the current system must be implemented. These might include pre-hearing contacts, the provision of non-lawyer advocates and some form of selective screening. (Author/EB)

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PROCEDURAL DUE PROCESS AND THE WELFARE RECIPIENT: A STATISTICAL STUDY OF AFDC FAIR HEARINGS IN WISCONSIN

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SPECIAL STUDENT PROJECT

PROCEDURAL DUE PROCESS AND THE WELFARE RECIPIENT: A STATISTICAL STUDY OF AFDC FAIR HEARINGS IN WISCONSIN*

In 1970 the United States Supreme Court held in *Goldberg v. Kelly*[1] that recipients of Aid to Families with Dependent Children (AFDC)[2] had a constitutional right to an evidentiary hearing before a local welfare agency could terminate benefits. In its opinion the Court responded to criticisms that the decentralized administration of AFDC benefits[3] gave too much discretion to local welfare officials who could take action against recipients for reasons unauthorized by law.[4] To insure that the reasons for any termination were justified, the Court required that an

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1. 397 U.S. 254 (1970).

2. The program (called Aid to Dependent Children (ADC) until the name was changed by Act of July 25, 1962, Pub. L. No. 87-543, §§ 104(a)(3)(A)-(G), 76 Stat. 172, 185) is part of the Social Security Act of 1935, ch. 531, §§ 401-406, 49 Stat. 620, 627-29, (current version at 42 U.S.C. §§ 601-610 (1970)). It had an express purpose of encouraging the care of dependent children in their own homes or in the homes of relatives "to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ." 42 U.S.C. § 601 (1970). The program provides for matching funds equal to a portion of the state's expenditures, 42 U.S.C. § 603 (1970), to be paid to the state if it establishes a state plan which meets the general requirements of 42 U.S.C. § 602 (1970). These requirements include a provision "for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness . . . ." *Id.*, § 602(a)(4). While differences in administration among states are expected, differences of administration and implementation of the program also occur within individual states. For a discussion of how and why this occurs, see Derthick, *Intercity Differences in Administration of the Public Assistance Program: The Case of Massachusetts*, in CITY POLITICS AND PUBLIC POLICY 243 (J. Wilson ed. 1968).

For the historical development of the AFDC program, see J. HANDLER, REFORMING THE POOR 11-16 (1972).

3. *See* notes 221-24 *infra* and accompanying text.

4. *See* notes 26-81 *infra* and accompanying text.

adversarial, "trial-type" hearing[5] be available to any recipient desiring one.

Although the Court broke new ground in *Goldberg* by applying due process standards to the administration of welfare benefits,[6] its reasoning reflected a deeply rooted faith that adversary procedures are the most effective means of dispute settlement.[7] This faith is based on the assumption that an adversarial procedure is the most effective way to determine facts accurately[8] and to maintain a sense of fairness and equality in governmental action.[9]

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5. The principle of a trial-type hearing is that a person with sufficient interest in adverse governmental action being taken against him is entitled to notice of and reasons for the action. To guarantee the integrity of the decisionmaking process, he should have the opportunity to learn all the unfavorable evidence against him and rebut it by presenting his own evidence and cross-examining the government's witnesses. Davis, *The Requirements of a Trial-type Hearing*, 70 HARV. L. REV. 193, 199 (1956).

Many different terms are used to describe the kind of hearing the Court required in *Goldberg*: adversary (or adversarial) hearings, trial-type hearings, and simply, *Goldberg* hearings. All will be used interchangeably for the purposes of this study.

6. The fourteenth amendment requires that states cannot "deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. Welfare benefits must fall into one of the three provisions of the amendment—life, liberty, or property—in order for welfare recipients to receive due process protections.

Traditionally, welfare was viewed as a privilege, not a right, and therefore not subject to due process protections. In Flemming v. Nestor, 363 U.S. 603 (1960), the Court held that a resident alien being deported for allegedly being a subversive had no property rights in the Social Security contributions he had made while working in the United States. Professor Charles Reich took the opposite approach in his seminal article *The New Property*, 73 YALE L.J. 733 (1964), arguing that the meteoric rise of governmental benefits and largess as a part of the national wealth made the "right/privilege" doctrine anachronistic. Instead, he proposed extending the concepts of property rights to many classes of governmental benefits and largess.

Critical commentators urging the establishment of fair hearings for welfare recipients largely echoed Reich's analysis in their search for a doctrinal justification for requiring hearings. However, when the Supreme Court faced the right/privilege issue in Goldberg v. Kelly, it sidestepped the issue by observing that the federal statute required states to provide hearings, and thus narrowed the constitutional issue to one of timing of the hearing. *See* notes 86-91 *infra* and accompanying text.

More complete discussions of the complexity of the right/privilege analysis can be found in Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *State Law Defines Limitation of Entitlement*, 1977 WIS. L. REV. 575. For a contrasting analysis of how "liberty" interests might be argued in favor of requiring due process safeguards, see Comment, *Procedural Due Process in Public Schools: The "Thicket" of Goss v. Lopez*, 1976 WIS. L. REV. 934, 960-64.

7. *See, e.g.*, Neef & Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y.L.F. 123 (1974).

8. Dean Wigmore's statement on the accuracy of adversary procedures is typical: "The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement . . . should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." 5 WIGMORE, EVIDENCE § 1367 (3rd ed. 1940).

9. Mr. Justice Frankfurter's often-cited analysis is a particularly eloquent statement of this principle:

> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience

Despite the subsequent extension of the *Goldberg* procedural requirements to suspension and reduction of AFDC benefits,[10] many critics now believe that merely providing an adversary hearing to welfare clients[11] has neither generated the anticipated benefits nor curbed the perceived abuses.[12] Some suggest that adversary procedures, though currently ineffective, can be made effective if all the participants in the hearing are made aware of the purposes and procedures of the hearing.[13] Others point to the limited use of the hearing process by recipients and the low rates of agency reversal as indications that the *Goldberg* procedures have failed, and suggest that alternative safeguards for recipients must be designed.[14] Additional questions have been raised whether a mass adjudicatory system can withstand the volume of hearings it must process.[15] The Supreme Court has shown similar misgivings on the effectiveness and potential benefits of hearings. Since *Goldberg* a majority of the Court has in most cases declined to extend adversarial hearing requirements to other classes of people adversely affected by governmental action.[16]

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does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

10. This extension was created by HEW regulations and lower federal court decisions. *See* notes 120-32 *infra* and accompanying text.

11. In this study "client" means both AFDC recipients and people applying for AFDC benefits.

12. *See* notes 174-220 *infra* and accompanying text.

The merits of the adversary system in general have recently come into question. *See, e.g.*, Strick, *Requiem for the Adversary System*, JURIS DOCTOR, February, 1977, at 18; Frankel, *From Private Rights Toward Public Justice*, 51 N.Y.U. L. REV. 516 (1976); Eggleston, *What is Wrong with the Adversary System?*, 49 AUSTR. L.J. 428 (1975); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic and Social Issues*, 71 MICH. L. REV. 111 (1972). The adversary system of course continues to have its defenders. *See, e.g.*, Letters to JURIS DOCTOR, May 1977, at 32; Connolly, *The Adversary System—Is It Any Longer Appropriate?*, 49 AUSTR. L.J. 439 (1975); Teitelbaum, *The Advocate's Role in the Legal System*, 6 N.M. L. REV. 1 (1975).

13. *See* notes 173-95 *infra* and accompanying text.

14. *See* notes 196-220 *infra* and accompanying text.

15. The breakdown of the Social Security hearing system has already been predicted. R. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION (1973); Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681. Although similar predictions have not been voiced specifically concerning the AFDC hearing system, the problems created by massive numbers of cases can also be severe. *See* D. BAUM, THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE (1974) [hereinafter cited as BAUM].

This study will not focus on the problems of an overloaded hearing system, and will instead focus on how effectively hearings currently operate. However, the reader should keep such problems in mind in any overall assessment of the desirability of requiring hearings.

16. *E.g.*, Bishop v. Wood, 426 U.S. 341 (1976) (no hearing required for firing of non-

The increasing ambivalence of critics and the Court toward the desirability of hearings has been based on differing perceptions of how *Goldberg* hearings have in fact operated. Yet these perceptions have been largely conjectural or impressionistic, and unsupported by empirical evidence.[17] The purpose of this study is to determine the effects that the *Goldberg* requirements have had on the outcomes of AFDC appeals,[18]

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probationary city employee if state law determines no property interest in employment); Mathews v. Eldridge, 424 U.S. 319 (1976) (formal hearing not required for termination of Social Security disability benefits), Wolff v. McDonnell, 418 U.S. 539 (1974) (cross-examination not constitutionally required in prison disciplinary hearings); Arnett v. Kennedy, 416 U.S. 134 (1974) (no hearing required prior to discharge of probationary federal employee); Board of Regents v. Roth, 408 U.S. 564 (1972) (no hearing required for termination of untenured professor working under a one-year contract). *But cf.* Goss v. Lopez, 419 U.S. 565 (1975) (school authorities required to give notice, explanation of charges, and opportunity for rebuttal to students facing suspension); Perry v. Sindermann, 408 U.S. 593 (1972) (hearing required if employee has reasonable expectation of continued employment); Morrissey v. Brewer, 408 U.S. 471 (1972) (hearing required for parole revocation); Bell v. Burson, 402 U.S. 535 (1971) (hearing required before suspension of driver's license). *See also* notes 133-48 *infra* and accompanying text.

17. To date, only three studies have attempted to evaluate some of the elements of AFDC hearings empirically. Two analyzed data gathered before the *Goldberg* requirements became effective. Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725 (1972); Handler, *Justice for the Welfare Recipient: Fair Hearings in AFDC—The Wisconsin Experience*, 43 SOC. SERV. REV. 12 (1969) [hereinafter cited as Handler, *Justice*]. The third was a 1973 study of *Goldberg* hearings in New York City. BAUM, *supra* note 15.

18. This study will not focus on hearings for other types of state- or locally-administered welfare benefits, such as Old-Age Assistance (OAA), Medical Assistance (MA), Aid to the Blind (AB), Aid to the Permanently and Totally Disabled (APTD), unemployment benefits, and general assistance. The reasons for a limited focus are twofold. First, AFDC has an enormous number of recipients and is one of the largest welfare programs in the country. *See* notes 36-38 *infra* and accompanying text.

Second, and more importantly, AFDC continues to have the qualities of nineteenth century welfare policies, which were based on the "pathological" theory of welfare. This theory viewed most causes of poverty as coming from character defects of the poor. J. HANDLER, *supra* note 2, at 7-8. The major purpose of nineteenth century welfare laws was to prevent the poor from becoming permanently dependent upon public charity. Welfare was locally administered, with almost complete discretion vested in county officials. It had extremely onerous conditions (at least by today's standards) to prevent assistance to the poor from becoming an attractive alternative to work. *Id.* at 7-9.

However, exceptions to this pattern soon arose. State government tried to distinguish the "deserving poor," whose poverty was unrelated to their character, from those who simply wanted to avoid working. The former included orphans of fathers who died in the Civil War, poverty-stricken Civil War Veterans, and the blind. These people were placed in state institutions under state rather than local control to separate them from the "undeserving poor" and avoid giving them the stigma of pauperism. *Id.* at 9-10.

Since the nineteenth century, attitudes have changed toward other classes of the poor as well. Old-age pensions, unemployment benefits, and Aid to the Permanently and Totally Disabled, are now commonly regarded as social insurance programs, whose recipients should not be subject to criticism as being "undeserving." *Id.* at 13-21. AFDC programs, on the other hand, originated as controls for juvenile delinquency. *See* note 2 *supra*. AFDC recipients have thus never been regarded as being completely "deserving," and eligibility and levels of benefits have traditionally been left to the discretion of local officials. With the exception of general assistance, the AFDC program has the most governmental intervention in the lives of its recipients, and is the program most subject to local abuse of discretion. Hearings for AFDC clients are therefore more likely to disclose more abuses of discretion

using statistical data from Wisconsin for the years between 1965 and 1976.[19] Wisconsin is particularly appropriate for a study of the effectiveness of adversary hearings because its *Goldberg* procedures became less adversarial for a brief period in 1974. To relieve a backlog of all welfare appeals, state officials began mediating AFDC appeals to attempt to reach a result satisfactory to both clients and local agencies without going through the more cumbersome and expensive hearing process.[20] Using the Wisconsin data, it is thus possible to compare the outcomes from a strictly adversarial system with those from a less formal system.[21] In addition, the impact of attorney representation on the hearing process can be examined and compared to the outcomes of unrepresented recipients.

Although this study is not intended to be a comprehensive legal analysis of procedural due process itself,[22] the legal perceptions of the courts and commentators on the need for hearings in welfare programs are examined in Part I to indicate basic attitudes toward hearings. Part II describes the technical aspects of the study, beginning by setting forth the hearing requirements in Wisconsin in light of the requirements of the federal regulations. An analytical framework is then developed to predict empirical levels of successful outcomes of AFDC appeals as a function of

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than they would for other programs. Hence, a study of AFDC hearings should provide better data on how effective hearings are in monitoring and correcting errors and abuses of discretion in local agencies.

For descriptions of the problems and abuses in general assistance administration, see Rosenberg, *Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance System*, 6 IND. L. REV. 385 (1973); Pevar, *Welfare and Its Administration in South Dakota*, 18 S.D.L. REV. 62 (1973).

19. The data used in this study is taken from the decisions and reports of each case written by Wisconsin hearing examiners. All decisions and reports include the following information: the name of the client, the county where the hearing request originated, the issue raised on appeal, the name and profession of the client's representative, if any, and the date of the decision or report. The outcome of the hearing request is also indicated in most cases. When a hearing is held, the hearing examiner lists the evidence presented at the hearing, his decision, and the reasons for his holding. If the client withdraws the hearing request, the hearing examiner indicates the reasons for the withdrawal, which often show whether or not the local agency has met the client's original demand.

20. *See* notes 243-53 *infra* and accompanying text.

21. An ideal investigation would study the effects of adversary procedures on state and local agency staff and on recipients to determine if the procedures improved the accuracy and curbed any abuses of the local agency. Such a study, unfortunately, is beyond the resources of this study. However, the statistical data generated by this study should provide a core from which future researchers can work.

22. Once it determines that due process applies, the United States Supreme Court uses a balancing test to determine whether a hearing is required *before* the government can take action and what procedural requirements (e.g., representation by an attorney, scope of discovery, opportunities for cross-examination, etc.) the hearing must follow. *See, e.g.*, Goldberg v. Kelly, 397 U.S. at 263 (recipient's interest in avoiding termination balanced against government interest in prompt termination of ineligibles). *See also* notes 88-91 *infra* and accompanying text.

For insightful discussions of possible approaches to the problem of interest balancing, see Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267 (1975); Note, *Specifying the Procedures Required by Due Process: Toward the Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

the type of adversary procedure used, legal representation, type of county where the cases originated, and the issue raised by the appeal. Finally, the random sampling technique used for selecting the cases in this study is described.

Parts III and IV present the results of the sample data obtained in the study. In Part III the theoretical effects of the fair hearing procedures anticipated by the courts and commentators are presented. These effects are then contrasted with the empirical results of the study. Part IV describes the effects of the state mediation efforts in 1974 and attorney representation throughout the 1965-76 period.

Comprehensive evaluations of all the empirical findings are provided in Part V. The effectiveness of the *Goldberg* due process procedures is first questioned in light of the anticipated benefits. The use of attorney representation and mediators to supplement the basic procedures is more fully examined and evaluated. Finally, suggestions for further supplementing and improving the fair hearing procedures are presented. The study concludes that if the goals desired by the courts and commentators are ever to be realized fully, further additions and supplements to the current system must be implemented.

I. The Legal Context of Fair Hearings

Little attention was paid to the legal problems of the poor until the mid-1960's.[23] In 1964, the Office of Economic Opportunity (OEO) was created by Congress. The OEO soon began a major program of extending legal services to the poor. For the first time in history, welfare recipients had some access to legal services, and their OEO attorneys began using the courts to establish and extend the legal rights of the recipient.[24]

Scholarly criticism of the administration of welfare rose dramatically at the same time welfare recipients were beginning to assert their legal rights. Criticism was most frequently leveled at the lack of accountability of most local agencies, and arguments were advanced in favor of adversarial hearings to remedy this abuse. This part of the study attempts to reproduce the flow of legal thinking on the desirability of hearings in the welfare system.

The first section is a synopsis of the problems and concerns of those who pressed for changes in the then-existing procedures and the mechanism they advanced as an appropriate solution, formal "due process" hearings prior to negative agency action towards a client's benefits. The second section discusses the Supreme Court's decision in *Goldberg v. Kelly*[25] as a response to these commentaries and goes on to summarize

23. A. LaFrance, M. Schroeder, R. Bennet, & W. Boyd, Law of the Poor 253 (1973).
24. *Id.* at 254-55.
25. 397 U.S. 254 (1970).

subsequent judicial activity in the area. The final section presents the critical commentary and alternative suggestions which have followed the *Goldberg* decision and the implementation of its requirements.

A. Critical Commentary Before Goldberg: The Need for Prior Hearings

The potential for an inaccurate or even arbitrary termination, reduction, or denial of welfare benefits began to be discussed by legal commentators in the mid-1960's.[26] The wide discretion given to individual caseworkers to make eligibility determinations and the clients' lack of the information, skill, and resources needed to assert their rights effectively were seen as the primary sources of inaccuracy and unfairness.[27] Legal analysis suggested review of caseworker decisions as a solution to the problem.[28] The principle discussion in the courts, the commentaries,

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26. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965) [hereinafter cited as Reich, *Individual Rights*] was one of the first.

Coash & Stuart, *Public Assistance Hearings in Michigan*, MICH. ST. B.J., March 1968, at 26, 31, attribute attorneys' concern with public assistance administration to the addition of legal services programs for the poor, who were formerly unable to pay legal fees. *But cf.* Wickenden, *Social Welfare Law: The Concept of Risk and Entitlement*, 43 U. DET. L.J. 517, 518 (1966) attributing the concern to more lofty ideals: (1) heightened awareness of the need for equal treatment because of the civil rights movement, (2) emphasis on legal representation brought about by Gideon v. Wainwright, 372 U.S. 335 (1963), and (3) national efforts to remedy the problems of the poor.

27. *See* Reich, *Individual Rights*, *supra* note 26; Morris, *Welfare Benefits as Property: Requiring a Prior Hearing*, 20 AD. L. REV. 487 (1968).

28. *See* Briar, *Welfare From Below: Recipients' Views of the Public Welfare System*, 54 CAL. L. REV. 370, 377-80, 384-85 (1966) [hereinafter cited as Briar]; Burrus & Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience*, 16 AM. U.L. REV. 199, 213-14 (1967); Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U.L. REV. 836, 912 (1968) [hereinafter cited as Graham]; Handler, *Controlling Official Behavior in Welfare Administration*, 54 CAL. L. REV. 479, 510 (1966) [hereinafter cited as Handler, *Official Behavior*]; Handler, *Justice*, *supra* note 17, at 18; Handler & Hollingsworth, *Reforming Welfare: The Constraints of the Bureaucracy and the Clients*, 118 U. PA. L. REV. 1167, 1168, 1184 (1970) [hereinafter cited as Handler & Hollingsworth, *Reforming Welfare*]; Morris, *supra* note 27, at 488, 503-04; Packard, *Fair Procedure in Welfare Hearings*, 42 SO. CAL. L. REV. 600, 623 (1969); Reich, *Individual Rights*, *supra* note 26, at 1252; Scott, *The Regulation and Administration of the Welfare Hearing Process—The Need for Administrative Responsibility*, 11 WM. & MARY L. REV. 291, 298 (1969) [hereinafter cited as Scott, *Administrative Responsibility*]; Sparer, *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A. L. REV. 361, 363-65 (1965) [hereinafter cited as Sparer]; Wickham, *Public Welfare Administration: Quest for a Workable Solution*, 58 GEO. L.J. 46, 47 (1969) [hereinafter cited as Wickham]; Note, *Right to Counsel in Public Welfare Hearings*, 48 B.U.L. REV. 468, 471-72 (1968) [hereinafter cited as *Right to Counsel*]; Note, *Aid to Families with Dependent Children—A Study of Welfare Assistance*, 44 DEN. L.J. 102, 107 (1967) [hereinafter cited as *Aid to Families*]; Comment, *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 FORDHAM L. REV. 604 (1969) [hereinafter cited as *Due Process*]; Comment, *The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing*, 68 MICH. L. REV. 112, 125, 129 (1969) [hereinafter cited as *Constitutional Minimum*]; Comment, *Welfare, Due Process, and the Need for Change*, 1 ST. MARY'S L.J. 224, 225 (1969) [hereinafter cited as *Welfare*]; Comment, *Texas Welfare Appeals: The Hidden Right*, 46 TEX. L. REV. 223, 234 (1967) [hereinafter cited as *Texas Welfare*]; Comment, *The Welfare*

and the regulations has dealt with the form of that review.

The caseworker is often the only personal contact the client has with the agency.[29] After an application is made, the caseworker determines whether and to what extent the client is eligible for benefits and accordingly makes a recommendation to the county administrator on what action should be taken.[30] That determination is periodically reevaluated by the caseworker upon a visit to the client's home.[31]

Two fundamental types of error can occur in this process. First, assistance may be granted to those who are not eligible. While this puts a strain on agency budgets and results in public protest, it is not the kind of error which defeats the purposes of the welfare system[32] and so was not the subject of critical commentary before *Goldberg*. Second, those who are eligible for aid may be denied entry to the program, or, after being admitted, may have their benefits improperly reduced or terminated. The purpose of the program, to provide assistance to those who qualify,[33] is defeated when such an error is made. Moreover, those who are eligible are by definition in need of the assistance and entitled to it.[34] A decision to deny or terminate assistance can have a devastating impact upon the client; therefore the commentators' primary concern was to avoid a client's erroneous exclusion.[35]

Recognition of several potential sources of error and their effects upon the clients' welfare initiated the commentators' concern over the accuracy of eligibility determinations. First, the sheer number of determinations involved made some errors inevitable.[36] The number of persons

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Recipient's Right to a Prior Hearing, 38 U.M.K.C. L. REV. 93, 97-98 (1969) [hereinafter cited as *Recipient's Right*]; Comment, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 YALE L.J. 1234, 1236-37 (1967) [hereinafter cited as *Withdrawal*].

29. *See* Briar, *supra* note 28, at 376-79, 383.

30. *See, e.g.*, WIS. STAT. § 49.19(2) (1975); WIS. DEPT. OF HEALTH & SOCIAL SERV., DIV. OF FAMILY SERV., INCOME MAINTENANCE MANUAL at ch. I-A, § 4(a)(1) (1977) [hereinafter cited as IMM].

31. *See, e.g.*, WIS. STAT. § 49.19(5)(e) (1975); IMM, *supra* note 30, ch. I-B. *See generally*, Briar, *supra* note 28, at 374-82; Handler, *Official Behavior*, *supra* note 28, at 493-94; Morris, *supra* note 27, at 487-88; *Aid to Families*, *supra* note 28, at 125-27.

32. That is, this situation neither frustrates the intentions of welfare programs nor creates the possibility of needless suffering. The overburdened, working taxpayer may be outraged and those eligible for assistance may be affected indirectly through budget restraints and guilt by association, but these ramifications stem from the desire to conserve public funds and not the desire to help the poor and unfortunate. The former desire is associated with the taxpayers' self-interest while the latter is more properly associated with a sense of justice.

33. 42 U.S.C. § 601 (1970).

34. *See, e.g.*, WIS. STAT. § 49.19 (1975).

35. *Constitutional Minimum*, *supra* note 28, at 128. This comment was cited by the Court in *Goldberg* as a "general discussion" of the problem. 397 U.S. 254, 260 n.7 (1970). *See also* note 50 *infra* and accompanying text.

36. The only mention of actual numbers of recipients was in Handler & Hollingsworth, *Reforming Welfare*, *supra* note 28, at 1167 n.2. The other commentators appear to have made an unstated assumption that welfare eligibility determinations affected large numbers of people and could not be made without occasional errors. *See, e.g.*, Morris, *supra* note 27,

receiving AFDC benefits in January 1969 was approximately 6,215,000.[37] The total had risen to 11,199,272 by August 1976.[38] Determinations of eligibility are made upon each admission to the program and redeterminations are made periodically thereafter.[39] In addition, eligibility determinations are made whenever entry to the program or supplemental benefits are denied or when the sufficiency of present benefits is questioned.[40] The result is a nearly overwhelming number of eligibility determinations made by a limited staff as quickly as possible. In such a demanding situation mistakes can easily be made.

Second, the structure of the AFDC program administration[41] placed eligibility recommendations, and hence a large amount of discretion, in the hands of a large number of caseworkers. Such discretion carried with it the potential for abuse in its exercise.[42] Moreover, this proliferation of decisionmakers increased the likelihood that similar cases would not receive comparable treatment. This possibility of abusive or inconsistent caseworker decisions having adverse effects was accentuated by the near automatic acceptance of caseworker recommendations by the local agency in determining eligibility.[43] Thus the actual decisionmakers were generally the caseworkers who comprised the largest, most widely dispersed element of the administrative system.

A third source of error existed because AFDC applicants and recipients are basically powerless; they have no political or economic leverage over the agency or the caseworker. They generally lack the information, skill, and resources needed to assert their rights effectively.[44] Some of the commentators who recognized this weakness did not see it as a reason to give clients more procedural rights, but rather expressed concern that trial-like hearings would be an inadequate protection and perhaps counterproductive.[45]

Finally, some commentators pointed to outside influences which could direct the exercise of discretion in a manner detrimental to the clients as an additional source of error. Community attitudes were often

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at 503-04; Reich, *Individual Rights*, *supra* note 26, at 1256; Scott, *Administrative Responsibility*, *supra* note 28, at 291-92.

37. *See* U.S. DEP'T OF HEW, PUBLIC ASSISTANCE STATISTICS JANUARY 1969 11, Table 7 (1969).

38. *See* U.S. DEP'T OF HEW, PUBLIC ASSISTANCE STATISTICS AUGUST 1976 9, 10, Tables 5 & 6 (1976).

39. *See* notes 30 & 31 *supra* and accompanying text.

40. WIS. STAT. § 49.19(2) (1975); IMM *supra* note 30, at ch. I-A, § 1 (1977).

41. *See* notes 2 *supra* and 221-24 *infra* and accompanying text.

42. *See* Graham, *supra* 28, at 850-51, 891-92; Handler & Hollingsworth, *Reforming Welfare*, *supra* note 28, at 1173-74.

43. *See* Handler & Hollingsworth, *Reforming Welfare*, *supra* note 28, at 1174.

44. Handler, *Justice*, *supra* note 17, at 14; Morris, *supra* note 27, at 488, 490-91; Reich, *Individual Rights*, *supra* note 26, at 1246; Wickham, *supra* note 28, at 63.

45. *See* notes 71-74 *infra* and accompanying text.

seen as unfavorable toward the client,[46] and limited budgets and agency policies were often viewed as dictating conservative distribution of public money.[47] Some commentators recognized a basic adversity existing between the agency and the client. This adversity might be caused either by moralistic attempts to "improve" the poor by imposing the agency's values upon them, or by the need to keep costs down.[48] Such adversity could produce a lack of cooperation and trust and result in an unnecessarily tight-fisted approach to eligibility decisions. Others saw the program as service oriented and therefore spoke of the client's need to remain on good terms with the agency.[49] To these authors, the client and agency were united in an effort to provide assistance to those who truly needed it.

Examples of unfair treatment were found to illustrate the potential for abuse and injustice,[50] making apparent the need for some form of protection for those entitled to aid. A procedure for evaluating eligibility determinations which would protect the clients' interests was felt to be needed. Reflecting the bias of the American legal system toward adversarial dispute settlement,[51] the first method welfare critics turned to was a review of the determination by an impartial third party at an adversarial proceeding in which the client and the agency could present their views and directly confront each other. Many commentators advocated that the most straightforward way of attaining such a procedure was to extend the fourteenth amendment right of due process[52] to welfare situations.[53]

The right to a hearing before agency action became effective was

46. *See* Graham, *supra* note 28, at 841; Handler, *Official Behavior*, *supra* note 28, at 501; Handler & Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients*, 22 STAN. L. REV. 1, 1 (1969); Reich, *Individual Rights*, *supra* note 26, PT 1245; Scott, *Administrative Responsibility*, *supra* note 28, at 293-94; *Right to Counsel*, *supra* note 28, at 469-70.

In ten Broek & Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966), the authors graphically describe how such community and caseworker attitudes can affect the recipient of public assistance. Noting that the programs providing aid to the aged, disabled, blind and dependent children are designed "to furnish relief for the uninsured residual groups," *id.* at 817, they describe how the societal conception of these diverse groups as "deviants," *id.* at 813, can result in great intrusions into privacy, distrust, and destruction of client self-determination, *id.* at 830-32.

47. *See* Graham, *supra* note 28, at 841; Handler, *Official Behavior*, *supra* note 28, at 501; Sparer, *supra* note 28 at 372-75.

48. Reich, *Individual Rights*, *supra* note 26, at 1245-46. *See also* Graham, *supra* note 28, at 841; *Right to Counsel*, *supra* note 28, at 488-89.

49. Handler, *Justice*, *supra* note 17, at 14, 33; Sparer, *supra* note 28, at 378; Wickham, *supra* note 28, at 63; *Texas Welfare*, *supra* note 28, at 238.

50. Packard, *supra* note 28, at 602-03; Reich, *Individual Rights*, *supra* note 26, at 1247-50; Sparer, *supra* note 28, at 371; Wickham, *supra* note 28, at 46-47; *Right to Counsel*, *supra* note 28, at 486-87; *Constitutional Minimum*, *supra* note 28, at 125; *Recipient's Right*, *supra* note 28, at 96-97.

51. *See* notes 7-9 *supra* and 59 *infra* and accompanying text.

52. *See* notes 5-6 *supra* and accompanying text.

53. Reich, *The New Property*, *supra* note 6, was the seminal work on the extension of due process rights to recipients of government benefits. Others have also seen the extension of due process rights as the critical issue. Burrus & Fessler, *supra* note 28; Morris, *supra* note 27; Sparer, *supra* note 28, at 363-65, 376-77; *Constitutional Minimum*, *supra* note 28.

seen by these writers as a means of expediting the handling of potentially meritorious requests for hearings[54] and for exposing and deterring abuses of discretion.[55] Prior hearings where the claimant had the right to present her[56] case, to be represented, to examine the agency's evidence, and to confront the agency's witnesses were seen as providing the forum and tools for the client to assert her rights effectively.[57] The opportunity for such review would provide real[58] and psychological[59] equality of treatment. It would also allow an objective evaluation of administrative rules and policy.[60] A hearing was thought to be the most reasonable way to determine the facts when a dispute arose between the agency and the client.[61] There was also hope that decisionmakers would make more precise judgments because the hearing process would assign responsibility to them[62] and require them to state the reasons for their action.[63]

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54. *Constitutional Minimum*, *supra* note 28, at 126.

55. Reich, *Individual Rights*, *supra* note 26, at 1252-53; *Texas Welfare*, *supra* note 28, at 227. *See* Sparer, *supra* note 28, at 375-77; note 161 *infra* and accompanying text. *But see* Handler, *Justice*, *supra* note 17, at 18, who did not feel that the organization would be very committed to self-control through hearings. *See also* note 77 *infra* and accompanying text.

56. AFDC clients are referred to in the feminine gender because most of the heads of families receiving benefits are women. This is not accidental; to be eligible a child must be "deprived of parental support or care by reason of the death, continued absence from the home or incapacity of a parent . . . ." WIS. STAT. § 49.19(1)(a) (1975). That parent is usually the father. Moreover, the mother, but not the father, may receive aid in her own right if she is "without a husband" unless her husband is disabled or incarcerated, has abandoned her, or is or will be divorced or legally separated from her. WIS. STAT. § 49.19(4)(d) (1975).

57. Reich, *Individual Rights*, *supra* note 26, at 1252-53; Scott, *Administrative Responsibility*, *supra* note 26, at 298-300, 362. Some, however, felt that representation by an attorney was essential to effective use of the hearing process. *Id.* at 362; *Right to Counsel*, *supra* note 28, at 474; *Welfare*, *supra* note 28, at 233-34; *Texas Welfare*, *supra* note 28, at 240.

58. Handler, *Justice*, *supra* note 17, at 18. *See* note 153 *infra* and accompanying text.

59. *See* Reich, *Individual Rights*, *supra* note 26, at 1253; note 156 *infra* and accompanying text.

This need for psychic satisfaction has traditionally been thought to be best served through the adversary hearing. *See* note 9 *supra* and notes 156, 158 *infra* and accompanying text. Some recent studies have concluded that the adversary system is preferred over other methods of decisionmaking by parties to a dispute. Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974); J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975), and is more likely to overcome decisionmaker bias. Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972). Other commentators, however, have argued that less formal procedures are preferable where the person affected by adverse governmental action has a continuing relationship with a government agency. *See* notes 215-19 *infra* and accompanying text.

60. Scott, *Administrative Responsibility*, *supra* note 28, at 298; *Texas Welfare*, *supra* note 28, at 227. *But see* Handler, *Justice*, *supra* note 17, at 18, who did not see this as very likely. *See also* note 77 *infra*.

61. Morris, *supra* note 27, at 504-05; Reich, *Individual Rights*, *supra* note 26, at 1253. *See* notes 153-54 *infra* and accompanying text.

62. Scott, *Administrative Responsibility*, *supra* note 28, at 300. *See* note 155 *infra* and accompanying text.

63. Reich, *Individual Rights*, *supra* note 26, at 1253; Scott, *Administrative Responsibility*, *supra* note 28, at 300; *Texas Welfare*, *supra* note 28, at 249.

Finally, the factual record developed at the hearing was viewed as facilitating judicial review if that should be necessary.[64]

Most commentators felt that the context of welfare determinations lent itself to the use of a hearing as a check upon administrative decisions. These decisions could be effectively reviewed because they involve objective criteria, less ad hoc policymaking, and a greater need for fairness than most administrative decisions.[65] A few authors, however, felt that welfare decisions were ill suited for review because of the large amount of discretion and individualized treatment involved.[66] Interestingly, both groups were comparing welfare administration with the activities of federal agencies regulating large corporations. Their contrary conclusions stem from their respective optimism and pessimism over the ability of the client to use the hearing system and the willingness of agency personnel to respond acceptably to the hearing decisions.

The hearing procedures advocated were also viewed as particularly

64. Burrus & Fessler, *supra* note 28, at 228. *See Constitutional Minimum, supra* note 28, at 118, contending that a constitutional right to a hearing would also make access to the courts easier and thus make enforcement more likely.

Review of a state regulation or hearing decision would be possible in federal court under 28 U.S.C. § 1331 (1970) as a federal question if the regulation or hearing was in conflict with federal law or regulations or deprived the claimant of her constitutional rights; the $10,000 jurisdictional amount would pose a significant obstacle, however. Review would also be possible in federal court under 28 U.S.C. § 1343(3) & (4) (1970), which has no jurisdictional minimum dollar requirement, if the claim were one of state action violating civil rights protected by 42 U.S.C. § 1983 (1970). King v. Smith, 392 U.S. 309, 311-12 (1968); Hagans v. Lavine, 415 U.S. 528, 533 & n.5. *See also* Herzer, *Federal Jurisdiction Over Statutorily-Based Welfare Claims*, 6 HARV. C.R.-C.L. L. REV. 1 (1970); Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 COLUM. L. REV. 1404 (1972); Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84 (1967). State regulations and hearing decisions may be reviewed as a matter of right in the state circuit courts under WIS. STAT. §§ 227.15-.21 (1975). Stacy v. Ashland Co. Dep't of Pub. Welfare, 39 Wis. 2d 595, 599-602, 159 N.W.2d 630, 632-34 (1968). Review in the United States Supreme Court would be by right of appeal only if the court of appeals held the state regulation unconstitutional, 28 U.S.C. § 1254(2) (1970), or if the Wisconsin Supreme Court upheld the regulation against a constitutional or federal statutory attack, 28 U.S.C. § 1257(2) (1970); in all other cases review would be by certiorari.

65. Reich, *Individual Rights, supra* note 26, at 1253. Subsequent commentators were not as explicit, but their general analysis indicates similar views. *See generally* Burrus & Fessler, *supra* note 28, at 200; Graham, *supra* note 28, at 912; Morris, *supra* note 27, at 505; Packard, *supra* note 28, at 623; Scott, *Administrative Responsibility, supra* note 28, at 298; Wickham, *supra* note 28, at 47-48, 50-52; *Right to Counsel, supra* note 28, at 477; *Aid to Families, supra* note 28, at 105-08; *Due Process, supra* note 28, at 604-05; *Constitutional Minimum, supra* note 28, at 124-25; *Withdrawal, supra* note 28, at 1234-37.

Cohn & Stuart, *supra* note 26, at 30-31, found that hearings are "usually concerned with administrative interpretations of manual provisions that seemed strained, too rigid, or not in keeping with the language of the underlying statute. That statute is usually not even consulted by the worker or his supervisor, before making a decision regarding an application."

66. Handler, *Official Behavior, supra* note 28, at 492-500; Handler, *Justice, supra* note 17, at 13; Handler & Hollingsworth, *Reforming Welfare, supra* note 28, at 1173-74. *But cf.* Sparer, *supra* note 28, at 375, who recognizes the power relationships and discretion of welfare administrators but concludes that hearings can be used effectively by *attorneys* representing clients to influence the exercise of that discretion.

useful in the welfare context. Timely and adequate appraisal of the intended action and of the agency's grounds were considered indispensible because of the dependency of recipients upon welfare payments for subsistence.[67] Often the client's lack of writing skills made oral, personal presentations desirable,[68] and the right to confront and cross-examine the agency's witnesses was thought to facilitate fair play and accuracy.[69] Finally, these commentators insisted that hearings be held prior to any agency termination or reduction of benefits so that the recipient would not be placed in any further difficulties.[70]

Other commentators, however, looked at the nature of the welfare system and the characteristics of the clients and thought that formal due process rights to a hearing were not the answer. According to these writers, welfare recipients are not prone to asserting their rights and would not avail themselves of the hearing procedures.[71] The lack of resources, education, and skill of the typical AFDC recipient were cited as reasons for this fear of nonuse of the procedures.[72]

Another factor identified by these commentators as contributing to the infrequent use of then-existing hearing procedures was the need for the client to carry on a relationship with the agency. The client depended upon the agency and might not have used the appeals procedure for fear of antagonizing the agency.[73] Moreover, Professor Joel Handler viewed the abandonment of less formal procedures existing in Wisconsin as a

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67. Reich, *Individual Rights*, *supra* note 26, at 1252; Scott, *Administrative Responsibility*, *supra* note 28, at 314-15; *Due Process*, *supra* note 28, at 609-10, 614.

68. Burrus & Fessler, *supra* note 28, at 222, 224-25; Scott, *Administrative Reponsibility*, *supra* note 28, at 329; *Due Process*, *supra* note 28, at 614-15; *Recipient's Right*, *supra* note 28, at 111.

69. Burrus & Fessler, *supra* note 28, at 223-24; Reich, *Individual Rights*, *supra* note 28, at 1252; Scott, *Administrative Responsibility*, *supra* note 28, at 329; *Due Process*, *supra* note 28, at 615; *Welfare*, *supra* note 28, at 232; *Recipient's Right*, *supra* note 28, at 112. *See* note 160 *infra* and accompanying text.

70. Burrus & Fessler, *supra* note 28, at 215; Morris, *supra* note 27, at 505-06; Scott, *Administrative Responsibility*, *supra* note 28, at 335-37; *Due Process*, *supra* note 28, at 609-10; *Welfare*, *supra* note 28, at 231; *Recipient's Right*, *supra* note 28, at 97-98; *Withdrawal*, *supra* note 28, at 1240-45.

71. Wedemeyer & Moore, *The American Welfare System*, 54 CAL. L. REV. 326, 342 (1966); Wickham, *supra* note 28, at 63; *Texas Welfare*, *supra* note 28, at 236-37, 247. *See* Handler, *Justice*, *supra* note 17, at 20, finding the actual appeal rates from 1945-65 to be only 1.2% in cases of denials and 0.4% in cases of terminations. *See also* Briar, *supra* note 28, at 379-80, 383-84, concluding from interviews with recipients that their view of themselves as supplicants precludes use of the hearings.

72. Handler, *Justice*, *supra* note 17, at 24; Wickham, *supra* note 28, at 63; *Texas Welfare*, *supra* note 28, at 237. This lack of ability also carries through to make them ill-equipped to make effective use of the hearing itself. Wickham, *supra* note 28, at 63.

73. Handler, *Official Behavior*, *supra* note 28, at 494-95; Handler, *Justice*, *supra* note 17, at 13; Wickham, *supra* note 28, at 63; *Texas Welfare*, *supra* note 28, at 238. There are two effects of this need to carry on a relationship. First, fear of upsetting the agency intimidates the client from requesting a hearing or into withdrawing a request. Second, if a hearing is requested and occurs, the inherent adversary atmosphere may actually damage the relationship and result in the feared hostility. *See also* notes 164-67 *infra* and accompanying text.

further handicap to the client because the increased adversarial quality of the more formal procedure would discourage its invocation.[74]

At least one writer found that the grievances of the clients related to substantive issues such as budget levels and special purpose benefits and were not related to the procedures by which benefits were granted or denied.[75] James Graham advocated changes in the substantive regulations and caseworker attitudes in addition to representation by attorneys or welfare rights organization members at the hearings. He felt that the regulations and the caseworkers could become less repressive by emphasizing the achievement of humane results rather than the minimization of costs.[76]

Finally, Robert Scott cited the very structure of the AFDC program under the Social Security Act as a major problem. According to Scott, too much discretion was placed at the local level.[77] This lack of central control over the implementation of the program meant that adequate federal regulations were not being implemented at the state and local level.[78] He concluded:

> Any attempt to secure compliance short of creating adequate machinery for the enforcement of federal regulations, will, of necessity, fall short of the desired goal: to make the welfare hearing process an effective and efficient means of insuring due process in the administration of public assistance.[79]

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74. Handler, *Justice*, *supra* note 17, at 31-33, saw the end of the mediational role of the district supervisors as the removal of a valuable resource that is not likely to be replaced by the activities of the hearing examiners or attorneys. Wickham, *supra* note 28, at 63, also saw the need to avoid formal procedures which would place the agency and the client in adversarial roles but was willing to give the new HEW regulations a chance to prove their effectiveness.

75. Graham, *supra* note 28, at 842-43. *See also* Briar, *supra* note 28, at 384-85, who did not find any complaints about the program but did suggest changes in the welfare agencies, their procedures, and attitudes so that clients would not see themselves as rightless supplicants.

76. *See* Graham, *supra* note 28, at 910-14.

77. Scott, *Administrative Responsibility*, *supra* note 28, at 363-67 suggested that the failure of state hearing regulations to provide an effective hearing process was due to (1) insufficient control over state agencies by HEW, (2) inadequate state rulemaking procedures, and (3) the variation in methods of state administration allowed under 42 U.S.C. § 302(a)(3) (1964). *See also* Handler, *Official Behavior*, *supra* note 28, at 481.

78. The binding effect of these regulations was in some doubt until the United States Supreme Court in King v. Smith, 392 U.S. 309, 317 (1968), stated that state plans "must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW" and cited the U.S. DEP'T OF HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION [hereinafter cited as HANDBOOK]. Nevertheless, the states generally failed to conform to the regulations at that time. Scott, *Administrative Responsibility*, *supra* note 28, at 357-60.

79. Scott, *Administrative Responsibility*, *supra* note 28, at 367. *See also* Handler, *Justice*, *supra* note 17, at 18, where he finds that the state organization is not likely to be committed to encouragement and use of "due-process redress" since it is "being asked to provide weapons that are to be used to attack the organization itself . . . [while] there are more palatable or administratively comfortable ways to check 'arbitrary action' . . . ."

Not surprisingly, the regulations governing the conduct of fair hearings[80] underwent numerous changes as the courts and commentators discussed them.[81]

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80. Until 1968 the publication of the regulations was accomplished through the HANDBOOK. *supra* note 78; after 1968 they appeared as 45 C.F.R. § 205.10. The HANDBOOK provisions on fair hearings were changed in 1967. Wickham, *supra* note 28, at 52; those effective from July 9, 1965 until the 1967 change will be cited as HANDBOOK (1967) while those in effect after the change will be cited as HANDBOOK (1968). The HANDBOOK was a series of loose-leaf binders sent to state agencies and periodically revised and updated. HANDBOOK (1967), Introduction. It consisted of "interpretations of the Social Security Act, requirements for state plans, criteria for administration of state plans, conditions for federal financial participation, and recommendations for improving public assistance programs and administration." Scott, ***Administrative Responsibility***, *supra* note 28, at 297, citing HANDBOOK (1968), pt. 1, § 4210.

81. The provisions in the HANDBOOK provided most of the essentials of procedural due process. Scott, ***Administrative Responsibility***, *supra* note 28, at 351. In substance, the provisions prior to 1967 required the state plan to incorporate the following three provisions: specific responsibility for the hearings within the state agency; binding decisions on the state and local agencies; and the details of the hearing procedures to be followed. In addition, the procedures themselves had to include the following: (1) The right to demand and obtain a hearing with respect to any agency action or failure to act with "reasonable promptness." (Defined as 30 days or less. *See* HANDBOOK (1967), pt. IV, § A-2331, item 1.) (2) Notice to claimant of the right to a hearing and the methods of obtaining one. (3) Publication of the hearing procedures by the state agency. (The HANDBOOK recommended the use of state regulations to "emphasize that there is 'due process' in program administration affecting the 'right' to public assistance." *Id.* at pt. IV, § 6333.) (4) An impartial *state* agency officer as the hearing examiner. (5) Hearings conducted at a time, date, and place convenient to the claimant and preceded by notice informing the claimant of the hearing procedure, of her right to representation by counsel, and of any provisions for payment of legal fees that might be available. (6) A time limit for the rendering of a decision. (7) The claimant's opportunity to examine all documents used at the hearing, present her case herself or through others, bring witnesses; establish facts and circumstances, advance arguments without undue interference, and question or refute any testimony or evidence. (8) The availability of a transcript. (9) Decisions based solely on evidence presented at the hearing. (10) Notification of the decision and the availability of judicial review. These ten requirements are contained in HANDBOOK (1967), pt. IV, § 6200.

Additional provisions existed in both phases of the HANDBOOK. Requests for hearings, unless abandoned, could only be withdrawn by the claimant in writing. HANDBOOK (1967), pt. IV, § 6331. In HANDBOOK (1968), pt. IV (to which all section numbers refer), § 6200(j) established the time limit for rendering a hearing at 60 days. *See* Scott, ***Administrative Responsibility***, *supra* note 28, at 338. Section 6300(g) made it possible for a successful claimant to receive retroactive payments. *See id.* at 335. Section 6200(h) allowed the claimant to request a second medical opinion at state expense. *See id.* at 325. Section 6200(b) allowed for a hearing on the additional ground of agency policy affecting the claimant's position. *See id.* at 304-05. Finally, there was always a provision that "the hearing is subject to the requirements of due process." HANDBOOK (1967), pt. IV, § 6337.

There was no provision for a hearing prior to termination or reduction of benefits or for the provision of attorneys at agency expense. The termination of assistance prior to the hearing, with the possibility of retroactive payments only if successful, led to many court challenges on due process grounds, *e.g.*, Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968) and Wheeler v. Montgomery, 296 F. Supp. 138 (N.D. Cal. 1968), which culminated in Goldberg v. Kelly, 397 U.S. 254 (1970) and Wheeler v. Montgomery, 397 U.S. 280 (1970). *See also* ***Constitutional Minimum***, *supra* note 28, at 112 n.4. On Nov. 26, 1968, a district court held in Kelly v. Wyman *supra* that termination prior to a requested hearing was unconstitutional; HEW proposed new regulations dated Oct. 30, 1968, approved Nov. 26, 1968, and published Nov. 30, 1968, providing for the continuance of benefits until the hearing decision. 33 Fed. Reg. 17,853 (1968). They provided for continuation of assistance

In summary, the commentators agreed that inaccurate eligibility determinations constituted a pressing problem for welfare administration. They further agreed that the sources of such errors were the ineffectiveness of client protests within a system characterized by huge caseloads, widely dispersed discretion, and the often conflicting goals of cost reduction and client service. Their disagreements centered around the means of achieving accuracy and fairness. Most believed that an opportunity for trial-like hearings prior to adverse agency action would prove to be the answer. The rest argued that such hearings would be an ineffective remedy and that more fundamental changes in the system were required.

B. Judicial Initiative and Response to Welfare Hearings

The previous section presented an outline of the basic concerns and objectives of legal writers addressing the problems of welfare administration. This section summarizes the judicial response to those concerns.[82] First, the seminal decision of the United States Supreme Court in *Goldberg v. Kelly*[83] is analyzed in detail. A brief description of subsequent applications and refinements of the *Goldberg* doctrine follows. Finally, Supreme Court decisions involving other government benefit programs are examined in order to observe the broader application of the principles announced in *Goldberg*.

1. GOLDBERG V. KELLY

Criticism of local agency practices reached its peak in 1970 with the Supreme Court's decision in *Goldberg v. Kelly*[84] that AFDC recipients must be provided an opportunity for evidentiary hearings before termination of their benefits.[85] The issue presented to the Court in *Goldberg* was quite narrow. Both parties agreed that the Social Security Act[86] extended

when a hearing was requested because of termination or reduction of assistance when an issue of fact or of judgment in an individual case was presented. *Id.* at 17,854. The proposal would have also provided for the provision of attorneys by the agency. *Id.*

45 C.F.R. § 205.10 was subsequently added, 34 Fed. Reg. 1144 (1969), but never became effective. The original effective date was Oct. 1, 1969, *id.*, but was changed to July 1, 1970, 34 Fed. Reg. 13,595 (1969); the entire section was revoked on June 30, 1970, 35 Fed. Reg. 10,591 (1970). This change in position was predicted in *Constitutional Minimum*, *supra* note 28, at 118-19, due to the change in administrations in 1969. Before that regulation would have become effective, the Court handed down its decision in Goldberg v. Kelly, 397 U.S. 254 (1970).

82. No statutory changes were addressed to the problem of client grievance procedures during the study period. Some amendments were made to the federal and state regulations governing fair hearings. *See* notes 81 *supra* and 122, 227-34, 236-40 *infra* and accompanying text. The primary legal activity, however, was in the courts.

83. 397 U.S. 254 (1970).

84. *Id.*

85. Although the Court did not hold that hearings were required before every agency action adversely affecting the recipient, *Goldberg* was later extended by the lower federal courts to apply to such cases. *See* notes 120-32 and accompanying text *infra*.

86. *See* note 2 *supra*.

due process protections to welfare recipients and that some kind of hearing was required by statute.[87] The Court thus had only to determine whether a hearing was constitutionally required before termination of benefits. The Court framed the constitutional issue as whether the "recipient's interest in avoiding that loss [termination of benefits] outweighs the governmental interest in summary adjudication."[88] More precisely, the balancing of these interests involved (1) the nature of the recipient's interest adversely affected by governmental action[89] (including the magnitude of the recipient's loss[90]), and (2) the nature and purpose of the government function in supplying benefits.[91]

Under the Court's analysis, the eligible recipient's interest is based largely on the enormity of the loss she faces if her benefits are erroneously terminated. By definition, an eligible AFDC recipient lacks "independent resources"[92] and avoids severe physical hardship only by receiving welfare benefits. If these benefits were erroneously terminated, she would be forced to spend so much time trying to sustain herself that pursuing a post-termination appeal to correct the termination would not be practically possible.[93]

The Court also found governmental interests in social stability in pretermination hearings.[94] For the poor, welfare benefits create "opportunities . . . to participate meaningfully in the life of the community"

87. 397 U.S. at 262-63. Despite the agreement of the parties, the Court dismissed any consideration of a right/privilege distinction in the welfare context:

> Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'"

Id. at 262. The Court noted that: "It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." *Id.* at 262 n.8. Most student commentary has focused on this aspect of the decision. *See, e.g.*, Note, *Constitutional Law—Due Process—Evidentiary Hearing Required Prior to Termination of Welfare Benefits*, 19 DE PAUL L. REV. 552 (1970); Note, *Constitutional Law—Due Process Includes Right of Welfare Recipients to a Fair Hearing Before Their Benefits are Terminated*, 49 J. URB. L. 185 (1971); Comment, *Constitutional Law: Due Process Requires Prior Hearing Before Termination of Welfare Benefits*, 23 U. FLA. L. REV. 422 (1971); Note, *Constitutional Law—Public Assistance—Due Process Clause Requires an Evidentiary Hearing to Precede the Termination of Benefits to Welfare Recipients*, 16 VILL. L. REV. 587 (1971); Comment, *Due Process of Law—Welfare Recipient's Right to Pre-termination Hearing*, 73 W. VA. L. REV. 80 (1971). *See also* note 6 *supra*.

88. 397 U.S. at 263.

89. *Id.*, *citing* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

90. 397 U.S. at 261, *citing* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter J., concurring).

91. 397 U.S. at 263, *citing* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

92. 397 U.S. at 264.

93. *Id.*

94. *Id.* at 264-65.

which they otherwise would not have.[95] The provision of welfare benefits should insure that the unemployed will not suffer "unjustified frustration and insecurity" and become disenchanted with the social order.[96] However, in order for welfare benefits to "guar[d] against social malaise," the Court stated that they must be dispensed accurately and without wrongful discontinuations.[97] According to the Court's analysis, only a pretermination hearing can guarantee these results.[98] These governmental interests therefore combine with the recipient's interest to make a powerful argument in favor of pretermination hearings.[99]

The state and local agencies did not directly challenge these arguments, but argued simply that the governmental interests in conserving administrative and fiscal resources outweigh any benefits pretermination hearings would have.[100] They suggested that since recipients rarely challenged terminations, decisions to terminate must be basically correct.[101] Based on this presumption they argued that pretermination hearings would allow ineligible recipients to prolong their benefits and drain the agencies' scarce fiscal and administrative resources. In contrast to the undesirable characteristics of pretermination hearings, the agencies argued that summary termination rarely imposed hardships on eligible recipients because of the fundamental accuracy of local agency decisions.[102]

The Court conceded that the costs the agencies identified were significant, but reasoned that the costs of prolonging benefits for ineligible recipients did not outweigh the combined governmental and recipient interests in avoiding termination of eligible recipients.[103] In fact, the Court stated that the costs of continuing benefits to ineligibles could be reduced greatly simply by holding hearings promptly. Since the costs of providing hearings did not outweigh the benefits, the Court held that pretermination hearings were constitutionally required in the AFDC program.[104]

The Court then listed the procedural requirements the pretermination hearings must follow. The local agency must give the recipient timely[105]

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95. *Id.* at 265.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 266.
104. *Id.*
105. *Id.* at 267. The Court did not specify any standards for timeliness, holding only that the seven-day notice provided by the New York City agency was not insufficient *per se*. *Id.* at 268.

and adequate[106] notice before termination and provide the recipient with an opportunity to oppose the termination at an adversary hearing.[107] The recipient must be allowed to argue her case orally,[108] to confront and cross-examine witnesses presented by the local agency testifying in favor of termination,[109] to be accompanied by counsel,[110] and to be fully informed of the agency's case for termination.[111] The hearing must also be conducted by an impartial decisionmaker who had no part in the decision to terminate benefits.[112] Finally, the decisionmaker must explain his decision in writing.[113] In spite of appearing to create a formal, quasi-judicial procedure, the Court stated that it intended simply to provide the recipients with a full, administrative review,[114] not to provide a judicial or quasi-judicial trial,[115] or to create a record to serve as precedent or form the basis for judicial review.[116]

Perhaps more significant than the procedural holdings in *Goldberg* was the requirement that agencies continue the benefits of any recipient requesting a hearing. Only if the hearing examiner later finds against the recipient will the benefits be terminated.[117] It had been widely believed that this requirement, combined with the prescribed hearing procedures, would effectively end the perceived abuses within the welfare system.[118] Such optimism was short-lived, however, and soon gave way to attempts to explain why *Goldberg* was not producing the anticipated results.[119]

2. SUBSEQUENT DECISIONS

a. In AFDC

Since *Goldberg*, the Supreme Court has not dealt with the specific

106. *Id.* at 267. The Court refused to specify what form and content would be adequate, although it observed, in dicta, that New York City's procedure of informing a client of the legal and factual reasons for termination of her benefits by letter followed by a personal conference was "probably the most effective way of communicating with recipients." *Id.* at 268.

107. *Id.*

108. *Id.* at 269. The Court felt that the hearing should be based on oral rather than written argument to compensate for the clients' probable deficiencies in writing skills.

109. *Id.* at 269-70.

110. *Id.* at 270-71. Although the Court cited the proposed HEW guidelines which would have required local agencies to provide counsel for recipients requesting pretermination hearings as evidence of the utility of having counsel available, it held only that due process required that the client's counsel be allowed to accompany her and help her present her case at the hearing, not that counsel be appointed for all appeals. The proposed HEW regulation was subsequently withdrawn. *See* note 122 *infra*.

111. *Id.* at 270, citing Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

112. 397 U.S. at 271.

113. *Id.* This requirement is intended to insure that the decisionmaker bases his decision only on the evidence presented at the hearing and the applicable statutes and regulations.

114. *Id.* at 268.

115. *Id.* at 267-68.

116. *Id.* at 268, 271.

117. *Id.* at 266.

118. *See* notes 26-81 *supra* and accompanying text.

119. *See* notes 149-53 *infra* and accompanying text.

matter of AFDC fair hearings.[120] The lower federal courts, however, have played an important role in clarifying the applications and implications of the right to prior hearings in AFDC eligibility determinations. In addition to those early decisions[121] which led to *Goldberg*, later federal court decisions have attempted to clarify those areas which were left untouched or not fully discussed by the Supreme Court in *Goldberg*. At the same time, HEW was adjusting its regulations on fair hearings to conform with *Goldberg's* requirements.[122] In many cases the courts have

120. The only decision dealing with the AFDC program upheld a regulation allowing the states to define "unemployed," for the purposes of the program for children of the unemployed, so as to exclude those who would not qualify for unemployment compensation. Batterton v. Francis, 432 U.S. 416 (1977). The Court has also decided cases involving other types of government benefits. *See* notes 133-48 *infra* and accompanying text.

121. *See* note 81 *supra*.

122. Following *Goldberg*, HEW proposed new, more detailed regulations which implemented the decision and incorporated the provisions of the HANDBOOK, *supra* note 78. 35 Fed. Reg. 8448 (1970). *See* note 81 *supra*. The proposal was to combine the fair hearings required by 42 U.S.C. § 602(a)(4) and governed by the HANDBOOK, with the pretermination evidentiary hearing required by *Goldberg*. *Id.* After a period for comment by interested persons and organizations, the proposal was adopted, with a few changes, effective Apr. 14, 1971. 36 Fed. Reg. 3034 (1971). In addition to the basic procedural provisions previously found in the HANDBOOK, *supra* note 78, the new regulations had several significant features. There was no requirement of provision of attorneys because the Court specifically refused to require such provision, 397 U.S. at 270.

The state agency was required to determine whether the issue involved was one of fact or judgment or of state agency policy. Assistance would continue until that determination was made but would continue until the hearing decision only if the issue was one of fact or judgment, 36 Fed. Reg. 3034 (1971) § 205.10(a)(5)(iii)(a)(1), unless the state chose to continue aid in all cases, *id.* § 205.10(a)(5)(iii)(a)(2). The claimant could request a prehearing conference with the agency staff which would not affect her right to a hearing but at which she could attempt to convince the agency that its proposed action was incorrect. *Id.* § 205.10(a)(5)(ii).

The minimum advance notice of intended action was expanded to fifteen days, *id.* § 205.10(a)(5)(i)(a), although the Court had found 7 days to be sufficient, 397 U.S. at 268. States could consolidate similar requests and claimants could demand group hearings, but individuals could always withdraw and receive an individual hearing. 36 Fed. Reg. 3034 (1971) § 205.10(a)(3)(v). Hearings were also possible in cases of suspension. *Id.* § 205.10(a)(3). The HANDBOOK (1967), *supra* note 80, had referred to *any* agency action. *See* note 81 *supra*. This was translated into "action affecting receipt, reduction or termination" in the proposal, 35 Fed. Reg. 8449 (1970); "suspension" was added for the final regulation, 36 Fed. Reg. 3034 (1971). Finally, the agency's evidence was made available for inspection prior to the hearing. *Id.* § 205.10(a)(10)(i).

Changes were proposed two years later to give greater flexibility to the states and thereby promote efficiency. 38 Fed. Reg. 9819 (1973). The resulting regulations, published at 38 Fed. Reg. 22,007 (1973), have remained in force except for a few changes discussed below. The option was added to hold evidentiary hearings at the local level and then change payments before the state-level hearing. 38 Fed. Reg. 22,007-08 (1973) § 205.10(a)(1)(ii) and (6)(iii). This provision was in response to Act of Oct. 30, 1972, Pub. L. No. 92-603, § 407, 86 Stat. 1329, 1489, which permitted states to use local evidentiary hearings in all programs, but more due process protections were added. 38 Fed. Reg. 22,006 (1973).

The period for advance notice was reduced to 10 days, 38 Fed. Reg. 22,007 (1973) § 205.10(a)(4)(i)(A), but certain exceptions to the advance notice requirement were added to replace the provision for prehearing conferences, *id.* § 205.10(a)(5)(ii). The period allowed for hearing decisions to be reached after a request is made was increased to 90 days, 38 Fed. Reg. 22,008 (1973) § 205.10(a)(16), and the "reasonable" period for action upon applications was extended to 45 days, *id.* § 206.10(a)(3). Hearings no longer needed to be available when state or federal law required automatic grant adjustments for classes of recipients. 38 Fed. Reg. 22,007 (1973) § 205.10(a)(5). Requests for hearings could be required to be in writing.

merely enforced the federal regulations against noncomplying state agencies.[123] In others, they have passed on the constitutionality of the new HEW regulations.[124]

Some clarifications of the Court's holding have been rather simple,[125] but in two areas there have been uncertainty and considerable litigation. The first area of ambiguity to appear after *Goldberg* involved reductions of AFDC benefits. Since the HEW regulations provided for hearing opportunities prior to reductions[126] the question was whether due process also required such hearing opportunities. The Court quickly acknowledged that *Goldberg* had not dealt with reductions and in *Daniel v. Goliday* remanded for consideration of the applicability of *Goldberg* to reductions.[127] The case was settled and the Court has not readdressed the issue. The lower federal courts have subsequently split on the question. There is authority for the proposition that in at least some fact situations reductions need not be preceded by an opportunity for a hearing.[128] Most courts, however, have regarded reductions as practically the same as terminations and required opportunities for prior hearings.[129]

The second difficult area for the courts has been the dependency of hearing rights upon the nature of the issue presented. *Goldberg* dealt with a situation in which an issue of fact existed. The requirement of a prior

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Id. § 205.10(a)(5)(i). Finally, state agencies were allowed to attempt to recoup assistance given pending the hearing decision when the agency's position prevailed. 38 Fed. Reg. 22,008 (1973) § 205.10(a)(6)(i).

That same day a proposal was made for new provisions in cases of "likely fraud." 38 Fed. Reg. 22,042 (1973). The proposal at 38 Fed. Reg. 9819 (1973) had provided for the abolition of need for advance notice in cases of "likely fraud." The concern expressed over that provision kept it from being included in the revised regulations. 38 Fed. Reg. 22,006 (1973). The regulations eventually adopted provided for an advance notice of only 5 days in cases of "probable fraud." 39 Fed. Reg. 12,008 (1974) § 205.10(a)(4)(iv). The result of all these changes plus rewordings and reorderings at each stage is the present, formidable set of regulations found at 45 C.F.R. § 205.10(a).

123. *E.g.*, Like v. Carter, 448 F.2d 798 (8th Cir. 1971); Guerrero v. Schmidt, 352 F. Supp. 789 (W.D. Wis. 1973); Serritella v. Engelman, 339 F. Supp. 738 (D.N.J. 1972); Jeffries v. Swank, 337 F. Supp. 1062 (N.D. Ill. 1971).

124. *E.g.*, Almenares v. Wyman, 453 F.2d 1075, 1087 (2d Cir. 1971) (upheld 45 C.F.R. § 205.10(a)(1) as it then existed); Harrell v. Harder, 369 F. Supp. 810 (D. Conn. 1974) (upheld some of the changes made by 38 Fed. Reg. 22,007 (1973). *See* note 122 *supra*).

125. *E.g.*, Wilson v. Dietz, 456 F.2d 314 (6th Cir. 1972), *cert. denied*, 408 U.S. 928 (1972) (holding that only the *opportunity* for an evidentiary hearing need be given and that benefits need be continued only through the hearing decision and not subsequent appeals).

126. *See* note 122 *supra*.

127. 398 U.S. 73 (1970).

128. Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975); Gonzales v. Vowell, 490 F.2d 475 (5th Cir. 1974); Rochester v. Baganz, 479 F.2d 603 (3d Cir. 1973); Merriweather v. Burson, 439 F.2d 1092 (5th Cir. 1971).

129. *See, e.g.*, Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975); Lyons v. Weinberger, 376 F. Supp. 248, 261 (S.D.N.Y. 1974); Serritella v. Engelman, 339 F. Supp. 738 (D.N.J. 1972); Bradford v. Juras, 331 F. Supp. 167 (D. Ore. 1971); Hunt v. Edmunds, 328 F. Supp. 468 (D. Minn. 1971); Cooper v. Laupheimer, 316 F. Supp. 264 (E.D. Pa. 1970).

evidentiary hearing has been interpreted as being limited to questions of fact.[130]

More recently, courts have expressed doubt over the ability to distinguish claims which present questions of fact from those presenting issues of law.[131] In response to this doubt, HEW has changed its regulations to make it more difficult to dispose of claims without a hearing on this ground.[132] Now, a hearing will follow a request in every instance except uniform reductions of benefits for all recipients pursuant to changes in state or federal law.

b. Supreme Court decisions in related areas

Mr. Justice Black in his *Goldberg* dissent expressed his fear that the majority's approach would logically and inevitably result in "a full adversary process of administrative and judicial review" before a welfare recipient could be removed from a program.[133] This has not occurred, nor have the *Goldberg* hearing requirements been extended to other areas of distribution of government benefits such as Social Security and unemployment compensation, although such an extension has been advocated.[134] In a few cases, the Court has explicitly refused to extend the *Goldberg* rationale,[135] but in most cases it has simply avoided the issue.

The Court has been most explicit in denying an expansion of the *Goldberg* concepts when recipients claimed that hearings are constitutionally required before Social Security benefits are terminated. In *Matthews v. Eldridge*[136] the Court reversed lower court decisions which had

130. Mothers' & Children's Rights Org. v. Sterrett, 467 F.2d 797, 800 (7th Cir. 1972); Mills v. Richardson, 464 F.2d 995, 1001 (2d Cir. 1972); Russo v. Kirby, 453 F.2d 548, 551 (2d Cir. 1971); Provost v. Betit, 326 F. Supp. 920, 923 (D. Vt. 1971).

131. Burlingame v. Schmidt, 368 F. Supp. 429, 433-34 (E.D. Wis. 1973) (the difficulty of distinguishing fact from policy issues, especially for the pleading client, makes it a due process requirement that the distinction first be drawn at or after the hearing); Yee-Litt v. Richardson, 353 F. Supp. 996, 999-1000 (N.D. Cal. 1973), *aff'd mem. sub nom.* Carleson v. Yee-Litt, 412 U.S. 924 (1973) (finding that claimants raising factual questions were being denied continued benefits pending a hearing because of error and misuse in fact/policy determinations).

132. Among the many comments elicited by regulations attempting to establish a fact/law distinction for rights to fair hearings, legal aid groups cited the cases questioning the distinction. HEW replied:

> In response to these comments and the court case, the regulations have been modified. The States may provide for group hearings on questions of policy or law. They need not provide a hearing where either State or Federal law requires automatic grant adjustments for classes of recipients. On individual requests not resulting from a change in State or Federal law, assistance must be continued pending a hearing decision unless the hearing officer determines at the hearing that the sole issue is one of State or Federal law or policy or a change in State or Federal law. . . .

38 Fed. Reg. 22,006 (1973). *See* 45 C.F.R. § 205.10(a)(5) (1976).

133. 397 U.S. at 278 (Black, J., dissenting).

134. Meyerhoff & Mishkin, *Application of Goldberg v. Kelly Hearing Requirements to Termination of Social Security Benefits*, 26 STAN. L. REV. 549 (1974).

135. Matthews v. Eldridge, 424 U.S. 319, 340-43 (1976); Ortwein v. Schwab, 410 U.S. 656, 659-60 (1973); Richardson v. Belcher, 404 U.S. 78, 81 (1971).

136. 424 U.S. 319 (1976).

found the procedures for determining the existence of a continuing disability to be unconstitutional because a pretermination hearing was not provided. The Court considered the risk of error in the present procedures and the probable value of additional safeguards while balancing the private interest against the government's interest in the Social Security context. It concluded that a hearing like that required by *Goldberg* was not necessary because the need for and value of a prior hearing was not as great as in a welfare context.[137] The Court had previously rejected a request for the imposition of strict rules of evidence at Social Security disability hearings.[138]

The Court has also made it clear that a due process right to an administrative hearing does not entail the full potential of due process rights to judicial review or limit congressional power to change the substantive legislation. In *Ortwein v. Schwab*[139] the Court refused to extend *Goldberg* and *Boddie v. Connecticut*[140] to judicial review of administrative hearings, even where the appellant is indigent, by upholding an Oregon statute requiring a $25 filing fee for appeals to the Oregon Court of Appeals for review of hearing decisions of old-age assistance terminations. The Court noted that due process does not require that a system for judicial review of agency hearings be provided, and emphasized the ability of the administrative hearing to provide the necessary minimum of due process.[141] In *Richardson v. Belcher*[142] the Court stated that:

> [T]he analogy drawn in *Goldberg* between social welfare and "property" . . ., cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.[143]

In most cases, however, the Court has been reluctant to reach the constitutional issue of just which due process rights are required in cases where recipients of government benefits seek an extension of the *Gold-*

137. *Id.* at 335, 340-43. The Court, however, was not rejecting the approach of *Goldberg* but rather claimed to be applying it in a distinguishable factual context to claimants who are not as dependent upon their benefits. *Id.* at 340-41. For an application of this balancing of interest in an AFDC context, see Barrett v. Roberts, 551 F.2d 662, 667-68 (5th Cir. 1977).

138. Richardson v. Perales, 402 U.S. 389 (1971). The decision could be viewed quite narrowly as one allowing the introduction of medical reports at such hearings, where the plaintiff has failed to use his subpoena power, even though the doctor's absence makes the report hearsay. But the way in which the Court distinguishes *Goldberg* and adopts a "fundamental fairness" test can be seen as a "departure" from the rationale of *Goldberg*. Brudno, *Fairness and Bureaucracy: The Demise of Procedural Due Process for Welfare Claimants*, 25 HASTINGS L.J. 813, 825-28 (1974).

139. 410 U.S. 656 (1973).

140. 401 U.S. 371 (1971) (requiring a waiver of court filing fees for indigents seeking a divorce).

141. 410 U.S. at 659-60.

142. 404 U.S. 78 (1971).

143. *Id.* at 81.

berg requirements to different programs. In some instances the Court has declined to address the issue on the ground that the statutory language in question disposed of the case.[144] The Court has also remanded other cases for reconsideration in light of changes in the HEW regulations[145] or state statutes[146] and for consideration of whether a redetermination of eligibility has mooted the case.[147] Finally, in one curious case, *Torres v. New York State Department of Labor*, the Court avoided the issue by affirming the lower court without opinion.[148]

The decision in *Goldberg*, therefore, has remained the furthest extension of the due process rights announced by the Court. Since then, recipients of government benefits have faced a Court which has either tried to avoid the issue or refused to apply the trappings of due process protection to situations that did not present instances of dire need. Correspondingly, the actions of the lower courts have been largely a process of clarification with minor expansions in cases of reduction of benefits and questionable law/fact distinctions.

C. *Critical Commentary after Goldberg: Disillusionment with Fair Hearings*

Critical commentary preceding *Goldberg* focused almost exclusively on the desirability of making hearings available to correct or prevent the official abuse and error which commentators felt pervaded the

144. *E.g.*, California Dep't of Human Resources Dev. v. Java, 402 U.S. 121 (1971); Wyman v. James, 400 U.S. 309 (1971). It has been argued, however, that *Wyman* was a "serious erosion of both the doctrinal and the underlying legal-political policy aspects of *Goldberg*". Brudno, *supra* note 138, at 837. *See also* note 148 *infra*.

145. Richardson v. Wright, 405 U.S. 208 (1972). Such deference to subsequent administrative rulemaking was in sharp contrast to the *Goldberg* Court's insistence on reaching the constitutional issue in spite of proposed regulations meeting the plaintiffs' demands. Brudno, *supra* note 138, at 834. *See also* 405 U.S. at 212-27 (Brennan, J., dissenting).

146. Fusari v. Steinberg, 419 U.S. 379 (1975).

147. Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973).

148. Torres v. New York State Dep't of Labor, 321 F. Supp. 432 (S.D.N.Y. 1971), *vacated and remanded*, 402 U.S. 968 (1971), 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd mem.*, 405 U.S. 949 (1972), *rehearing denied*, 410 U.S. 971 (1973). As in California Dep't of Human Resources Dev. v. Java, 402 U.S. 121 (1971), the issue was whether a prior hearing was required for suspension or termination of unemployment compensation, and the remand was for consideration in light of that decision. *Java* had found that 42 U.S.C. § 503(a)(1) (1970) required a prior hearing and did not reach the constitutional question. 402 U.S. at 124. *See* text accompanying note 144 *supra*. The three-judge court distinguished *Java*'s statutory holding, 333 F. Supp. at 344, and adhered to its prior holding in 321 F. Supp. at 437-38 that due process was not violated by the procedures in question. 333 F. Supp. at 343. It was the apparent aproval through silence of a constitutional holding, arguably at odds with *Goldberg*, which caused Justices Marshall, Douglas and Brennan to protest the handling of the case vigorously. 410 U.S. at 971-75 (Marshall, J., dissenting). The Court has since noted that the summary affirmance was at odds with "our more considered disposition of *Java*" and should be interpreted narrowly. Fusari v. Steinberg, 419 U.S. 379, 388-89 n.15 (1975). As Chief Justice Burger explained, a summary affirmance without opinion affirms the judgment but not necessarily the reasoning and "is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument." *Id.* at 391-92 (Burger, C.J., concurring).

administration of welfare benefits.[149] Since the *Goldberg* decision, many observers have come to feel that hearings would not automatically solve the problems of welfare clients in dealing with local bureaucracies. Their analyses changed from the earlier showing of need for hearings to describing why hearings were not producing the anticipated benefits.[150]

The reasons for the perceived failure of *Goldberg* hearings have rarely been specified fully. Few critics have ever given a theoretical basis for why hearings should produce the desired results. Only Professor Robert O'Neil, in his review of the *Goldberg* decision,[151] has spelled out the basic values and assumptions underlying the widespread confidence in adversary hearings. His analysis will therefore be examined in detail to provide a standard by which *Goldberg* and subsequent criticism of its efficacy can be measured.

1. THE BASIC ANALYSIS—HOW ADVERSARY HEARINGS WORK

O'Neil's analysis incorporates the interests and values promoted by adversary hearings and the countervailing governmental interests. These interests and values, which accrue to both the individual client and society, can be classified into three general categories: accuracy, behavioral benefits, and psychological benefits.[152] Accuracy is the primary benefit, which gives rise to the others. O'Neil thinks adversary hearings are the best way to promote accuracy because from the battle between the client and the agency the truth should be determinable. Since the client and the agency know the facts affecting the appeal better than anyone

149. *See* notes 26-65, 67-70 *supra* and accompanying text. *But see* notes 66, 71-77 *supra* and accompanying text (commentators who felt that the nature of the client, the program, and the decisions involved precluded the anticipated benefits of hearings in the welfare setting).

150. *See, e.g.*, BAUM, *supra* note 14; Denvir, *Controlling Welfare Bureaucracy: A Dynamic Approach*, 50 NOTRE DAME LAW. 457 (1975) [hereinafter cited as Denvir]; Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267 (1975) [hereinafter cited as Friendly]; Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974) [hereinafter cited as *The Management Side of Due Process*]; Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818 (1971) [hereinafter cited as *Welfare Reform and Local Administration*]; Redlich, *The Art of Welfare Advocacy: Available Procedures and Forums*, 36 ALB. L. REV. 57 (1972) [hereinafter cited as Redlich]; Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48 (1976) [hereinafter cited as Rubenstein]; Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725 (1972) [hereinafter cited as Scott, *The Reality of Procedural Due Process*].

151. O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161.

152. This classification is somewhat more general than O'Neil's, which included five disparate benefits: (1) accuracy and fairness, (2) accountability, (3) visibility and impartiality, (4) consistency, and (5) integrity. *Id.* at 185-90. Since O'Neil's categories overlap in places, the current classification has been devised to separate the major beneficial aspects of hearings.

else, and are the most interested in the outcome, all relevant facts should be exposed and a neutral decisionmaker can be assured of making an accurate decision.[153]

With the decisionmaker likely to reach accurate results, O'Neil predicts additional behavioral benefits. Adversary hearings should help to deter frivolous claims or unjust agency actions, since the reasons and justifications for agency actions will be debated at the hearings.[154] Besides deterring unfair agency and client actions O'Neil states that agency accountability increases with adversary hearings by clarifying actions which would otherwise remain ambiguous.[155]

Finally, O'Neil argues that adversary hearings have intrinsic psychological value. By guaranteeing accuracy, they give both the client and society at large the feeling that all interests have been treated fairly.[156]

Implicit assumptions underlie each of these perceived benefits.[157] For accuracy, the analysis assumes that the parties involved in the hearing know and understand the disputed facts better than anyone else. In the welfare context, this assumption means that the client must know not only the facts of her case, but the applicable federal, state, and local regulations as well. For behavioral benefits, the analysis assumes that the threat of exposing meritless claims or actions will deter both clients and welfare personnel from making groundless claims or charges. The mechanism of this inhibition is not clear, but presumably exposure of meritless claims or actions involves some social stigma to the party making the claim that outweighs any gain the unjustified claim or charge might have produced. To obtain the psychological benefits, the analysis assumes that people are less concerned about the outcome of hearings than about the way in which the outcome was reached.[158] If any of these assumptions is relaxed or rejected, the hearing procedures may no longer produce the anticipated benefits.

O'Neil's analysis also includes an accounting of governmental costs which might militate against requiring hearings. The costs are threefold. First, the relationship between the agency and the client, which is essentially cooperative, may become adversarial, to the detriment of the client.

153. *Id.* at 185-86. *See also* note 61 *supra* and accompanying text.

154. *Id.* at 189-90. *See also* note 69 *supra* and accompanying text.

155. *Id.* at 188. *See also* note 69 *supra* and accompanying text. Clarification of the reasons for agency action makes it easier for the courts to hold an agency accountable to its legislative mandate, to insure the validity of agency action, and to protect the constitutional rights of recipients. *Id.*

156. *Id.* at 186, 189. O'Neil believes this feeling is important to society because the welfare system will have society's support and confidence only as long as the decisions the system makes are accurate and fair. *Id.* at 186. He also feels that fairness to the client is an important benefit itself and that the agency can treat the client fairly only if its decisions regarding her eligibility are accurate. *Id.*

157. The following assumptions were never stated explicitly by O'Neil, although they can be readily inferred from his analysis. They are included here simply for clarification.

158. *Cf.* THIBAUT & WALKER, *supra* note 59. *See also* note 9 *supra*.

The agency staff might become more intransigent and inflexible if it fears that any decision taken may be subject to attack at an adversary hearing.[159] O'Neil considers this argument unpersuasive. He stresses that not every part of the relationship would be affected by requiring adversarial hearings. The mere availability of an adversarial hearing should not make every client/agency relationship adversarial according to O'Neil. Any hostility that results from such a hearing may well have resulted without a hearing, caused by an already strained relationship rather than by the hearing.[160]

Second, costs may be imposed on those persons who might become recipients in the future. Adoption of adversary hearings may create bureaucratic rigidity, making admission to welfare programs more difficult.[161] If this reaction does occur, O'Neil argues that it is proper and fair to favor those who are currently receiving benefits over those who might be clients in the future.[162] The basis for his argument is that current clients have usually given up financial assets to become eligible for benefits and therefore have a reliance interest superior to the interests of potential clients.[163]

Third, adversary hearings might impose an efficiency cost on agency operation. Adversary hearings may hamper agency initiative to devise new and better ways of dealing with clients.[164] The assumption behind this concern is that the agency is in the best position to know and meet the needs of clients. O'Neil doubts the validity of this assumption, citing the reluctance of HEW to promulgate its pretermination hearing regulations until the Supreme Court decided *Goldberg*.[165]

The agency's ability to obtain needed confidential information is another efficiency cost that may be impaired by the hearing procedures. If the sources of information know that the client can gain access to that information during the course of an adversary hearing they may be less willing to release it.[166] O'Neil doubts this is a serious cost. He believes that what is at the core of the problem is not the revelation of confidential information but the revelation of the identity of the person providing the information, which could remain confidential.[167]

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159. O'Neil, *supra* note 151, at 190-91. *See also* notes 62-63 *supra* and accompanying text.

160. *Id.* at 191-92. O'Neil suggests that instead of introducing detrimental elements into the client-agency relationship, the hearing is the most constructive way of treating disagreements between agency and client. *Id.*

161. *Id.* at 192.

162. *Id.*

163. *Id.*

164. *Id.* at 192-93. *See also* note 66 *supra* and accompanying text and text accompanying note 159 *supra*.

165. *Id.* at 193. For the history of the HEW regulations before *Goldberg*, see note 81 *supra*.

166. *Id.* at 194.

167. *Id.*

A final negative effect of adversary hearings on administrative efficiency is actual hearing cost.[168] The requirements of any hearing procedure demand that the agency maintain a staff to receive and process hearing requests and to hold the hearings. The hearing process is undoubtedly time consuming and probably takes welfare personnel away from other vital welfare functions. Welfare agencies have scarce resources in any case and their limited funds might be more effectively used for purposes other than hearings. Notwithstanding these concerns, O'Neil argues that cost is irrelevant if hearings are constitutionally required by the factual circumstances, as they were in *Goldberg*.[169]

In O'Neil's treatment, the likelihood of excessive cost for use of adversary procedures is regarded as having little significance, and the expected benefits justify the expense. O'Neil thus sees adversary hearings as producing only benefits, much as the *Goldberg* Court did.[170] Subsequent commentators have implicitly adopted O'Neil's analysis, though they have differed in the relative weights they give to the costs and benefits of the hearings. Most disagree, however, with the implication that the welfare client by herself can be an effective adversary.[171] They view many clients as poorly educated, possibly only marginally literate, and uninformed of how the welfare system operates or of their rights, including their right to an adversary hearing. These commentators conclude, therefore, that the normal client is a very poor adversary.[172] With this modification, critics have begun to question why adversary hearings have not produced the anticipated benefits. However, they have taken two very different approaches: (1) explaining how adversary hearings can work effectively and why they have not, and (2) questioning the validity of adversary hearings in the welfare context.

2. THE MODIFIED ANALYSIS—WHY ADVERSARY HEARINGS HAVE NOT WORKED

One group of commentators has concluded that the benefits anticipated from the *Goldberg* requirements have not been realized because clients are unaware of or misinformed about their rights to a hearing, and therefore have not taken advantage of the hearing process available to them. These commentators accept the underlying theory of O'Neil's analysis, arguing only that the anticipated benefits are not achieved

168. *Id.*
169. *Id.* at 194-95.
170. *See* notes 84-119 *supra* and accompanying text.
171. *Cf.* notes 71-72 *supra* and accompanying text (some pre-*Goldberg* commentators doubting the ability of the welfare client as an effective adversary).
172. Mashaw, *The Management Side of Due Process*, *supra* note 150, at 781-82, 811; Radlich, *supra* note 150, at 59, 61, 68; Rubenstein, *supra* note 150, at 67, 69; Scott, *The Reality of Procedural Due Process*, *supra* note 150, at 734, 763. *See generally* BAUM, *supra* note 15; Denvir, *supra* note 150; Friendly, *supra* note 22; Mashaw, *Welfare Reform and Local Administration*, *supra* note 150.

because hearings are rarely used by uninformed clients.[173] They account for the clients' lack of knowledge about hearings as due to the decentralized administration of welfare[174] which leaves most of the implementation of the *Goldberg* requirements, including the notice requirements, in the hands of local welfare agencies.[175]

In the absence of centralized guidance or enforcement of hearing policies, these commentators have pointed to several factors which may discourage local welfare agencies from informing clients of their rights to a hearing. These factors include hostile local opinion toward welfare clients, uncertain attitudes toward hearings due to conflicts in the welfare laws, hostile or indifferent caseworker attitudes toward fair hearings, and bureaucratic pressures for conformity of caseworker opinion.

Local pressures may override federal or state policies. Local opinion may be hostile to welfare clients and may make welfare agencies reluctant to inform clients of their rights, either because the agency staff shares the local opinion or because the agency fears political reprisal of some sort if it implements policies in conflict with local opinion.[176]

Even if local attitudes are friendly or neutral, local agencies face conflicting goals inherent in the welfare laws—the duty to give aid to all those eligible to receive it, and the practical necessity to conserve public monies by not providing benefits to ineligibles. The tensions between the two goals are often resolved in favor of conserving the public fisc. Consequently, local agencies often do not give notice to clients of their rights to a hearing, or merely give perfunctory written notice that the client may not understand.[177]

Because for many recipients the only source of information about welfare is their caseworker, the attitudes of the caseworkers in a local

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173. BAUM, *supra* note 15; Denvir, *supra* note 150; Mashaw, *Welfare Reform and Local Administration*, *supra* note 150; Scott, *The Reality of Procedural Due Process*, *supra* note 150.

174. *See* BAUM, *supra* note 15, at 38; Mashaw, *Welfare Reform and Local Administration*, *supra* note 150, at 822. *See also* Denvir, *supra* note 150; Mashaw, *The Management Side of Due Process*, *supra* note 150; Redlich, *supra* note 150; note 77 *supra* and notes 221-29 *infra* and accompanying text.

175. *See, e.g.*, Denvir, *supra* note 150, at 459; Mashaw, *Welfare Reform and Local Administration*, *supra* note 150, at 819, 822.

176. Denvir, *supra* note 150, at 469. *See also* Mashaw, *Welfare Reform and Local Administration*, *supra* note 150, *passim*. Mashaw studied AFDC administration in five Virginia counties, ranging from an urbanized county to small, rural counties. He concluded that while the urbanized counties seemed to accept the *Goldberg* requirements, *id.* at 824-25, the rural county agencies were openly hostile to clients and adopted local policies completely contrary to *Goldberg*, *id.* at 825.

177. *See also* note 46 *supra* and accompanying text. BAUM, *supra* note 15, at 38; Denvir, *supra* note 150, at 461; Mashaw, *Welfare Reform and Local Administration*, *supra* note 150, at 824-25.

For contrasting views of the effects of the conflicts in the welfare laws, see Mashaw, *The Management Side of Due Process*, *supra* note 150, at 780-82 (conflict makes adversary system unworkable; *see* notes 218-19 *infra*); and Redlich, *supra* note 150, at 72 (fiscal pressures make local hearing impartiality impossible).

agency also act to determine how well clients are informed of their rights.[178] If the local agency neither discourages nor encourages its caseworkers to inform clients of their rights, the degree to which an individual caseworker will inform clients of their rights to appeal adverse decisions depends on the caseworker's own attitudes toward the hearing process.

Individual attitudes are shaped by the caseworker's view of the purpose of his job. If he views his professional function as providing "moral supervision" of the poor, he will tend to see the hearing process as an undesirable interference with his work, and will be less likely to inform his clients fully of their rights.[179] If, on the other hand, he sees his role as administering a program that provides financial support to the poor, he will favor, or at least not oppose, hearings and will be more likely to keep his clients fully informed of their rights.[180]

The preceding analysis appears to be somewhat overstated. A nationwide survey found that few caseworkers had negative attitudes toward clients and the hearing process, and a reasonably large number had favorable attitudes.[181] The dominant attitude, however, was ambivalence and indecision.[182] The surveyor felt that the lack of strong, favor-

178. Denvir, *supra* note 150, at 466.

179. *Id.* at 467.

180. *Id.* Scott, *The Reality of Procedural Due Process*, *supra* note 150, has developed a more complete description of caseworker attitudes, which he claims can predict whether or not a caseworker will inform clients of their rights. The likelihood that a caseworker will provide such notice is a function of his attitudes toward hearings and his perception of his role in the hearing process. According to Scott, the general attitude toward hearings is a composite of five propositions: (1) whether hearings are essential to effective welfare administration, (2) whether it is necessary to explain fully to a client her right to a hearing and the procedure she must follow to obtain it, (3) whether the client should use independent representation in pressing her claim, (4) whether welfare is a "right," not a "grant" (*see also* note 6 *supra*), and (5) whether there are institutional pressures (either management or peer group) against informing clients of their rights. *Id.* at 735-37. Except for (5), Scott regards opinions supporting these propositions as indicating a positive attitude toward hearings and caseworkers with such attitudes will be inclined to inform clients of their rights. *Id.* at 737.

Scott's analysis of caseworker perceptions of their role in the hearing process is basically similar to Denvir's. However, Scott also accounts for a middle ground between hostility and support that is dependent upon the attitudes of others in the bureaucracy. If the caseworker's attitudes are uninformed, indecisive, or ambivalent, Scott feels the caseworker will inform the client of her rights only to the extent that the majority of his peers do or that the management of the welfare agency insists. *Id.* at 737-38. *See also* note 176 *supra*.

181. *Id.* at 760.

182. *Id.* Two reservations should be given before Scott's survey results are accepted, although his basic analysis of caseworker attitudes, *supra* note 180, appears sound. The goal of his study was a nationwide profile of caseworker attitudes based on a questionnaire he designed to detect pro-client, anti-client, or neutral or ambivalent attitudes of caseworkers toward clients and hearings. Questionnaires were distributed to state agencies which then distributed them to selected caseworkers. As Scott realized, this method of distribution does not produce a random sample. *Id.* at 740-42. An additional statistical problem which he did not address is the validity of assigning equal weight to each questionnaire returned.

A further reservation about the significance of the reported attitudes must be given because of the timing of the questionnaires. The questionnaires were distributed and

able opinions toward the hearing process stemmed from the caseworkers' lack of legal training and consequent insensitivity to the benefits of an adversary proceeding.[183]

Another factor that may inhibit agency compliance with the *Goldberg* notice requirements is the bureaucratic structure of local welfare agencies. The functions of a local agency are as complex and the staff as large as many administrative bureaucracies. One commentator has suggested that welfare caseworkers should not be regarded as being significantly different from other bureaucrats and, like other bureaucrats, are equally anxious to protect what they perceive to be their institutional interests.[184] The decentralized administration of welfare has given caseworkers a great deal of discretion, while exposing them to bureaucratic pressures that may bias them against the client.[185] Peer pressures exist in any bureaucracy, and if a caseworker's peer group looks unfavorably on clients, pressures to conform to the group's attitudes may informally but effectively undermine any agency policy to the contrary.[186]

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returned nearly a year before the *Goldberg* decision. *Id.* at 740 n.64. Thus, Scott's conclusions about the likelihood of the implementation of *Goldberg* requirements are based upon pre-*Goldberg* attitudes. His conclusions are only valid to the extent that caseworker opinions have not changed in the years since *Goldberg*.

183. *Id.* at 760. An issue underlying caseworker attitudes is caseworker education, training, and turnover. Caseworker education and educational requirements seem to vary. In the Virginia study, almost all of the agency staff in urban counties had at least a bachelor's degree, but agency staff in rural counties in the same vicinity had only a high school education. Mashaw, *Welfare Reform and Local Administration*, *supra* note 150, at 827-28. In New York City, eligibility technicians, used by the Department of Social Services to determine initial eligibility and the amount of the grant, frequently have only a high school education. BAUM, *supra* note 15, at 36. *See also* Denvir, *supra* note 150, at 468.

Training periods tend to be short. In New York City, eligibility technicians have a two to three week training course. Upon completion, they are put to work processing claims and receive no further training or ongoing review. BAUM, *supra* note 15, at 37. On the other hand, Scott, *The Reality of Procedural Due Process*, *supra* note 150, found an average training period of 2 months, with an upward variation of 6 months of on-the-job training. *Id.* at 742. *But see* note 182 *supra* for reservations of the reliability of Scott's survey. The New York training experience seems more like the Wisconsin experience. *See* note 266 *infra*.

Turnover in local welfare agencies is high. In New York, there are always unfilled vacancies for eligibility technicians. BAUM, *supra* note 15, at 37. In Virginia, however, turnover was rapid only in the urban counties, where most staff members were from elsewhere. By contrast, rural welfare agency staff members usually were from the county and rarely left their jobs once hired. The difference in origins and turnover rates prompted Mashaw's suggestion that urban staffs may follow administrative regulations more than rural staffs since they have little contact with the area in which they work and hence are not subject to local opinions on welfare to the same extent that the rural staffs are. Mashaw, *Welfare Reform and Local Administration*, *supra* note 150, at 827-28. *See also* Denvir, *supra* note 150, at 462.

The lack of caseworker training in particular might be expected to have an adverse effect on the accuracy of welfare determinations, given the complexity of the eligibility and grant requirements. Nevertheless, commentators have generally ignored this aspect of welfare administration.

184. Denvir, *supra* note 150, at 464.

185. *Id.* at 439.

186. *Id.* at 466.

Moreover, the caseworker faces institutional pressures to conform. His supervisor usually has more experience than the caseworker does, and his opinions are therefore influential.[187] More importantly, since the supervisor is likely to control the caseworker's promotions, the caseworker has every incentive to conform to the supervisor's views.[188] The influence of the supervisor over the caseworker is magnified by the powerlessness and lack of influence of the clients.[189] It thus would not be surprising to find that, faced with a need to choose between agency and client, the caseworker sides with the agency and its resources, rather than with the poor and powerless clients.[190]

According to these commentators, all the factors discussed above combine to form a powerful bias against informing welfare clients of their rights to a hearing. Solutions proposed to eliminate this bias usually are based on the perception of the cause of the bias. If decentralization leads to local policies or practices contrary to the *Goldberg* requirements, enough centralization should occur to force compliance.[191] If caseworker attitudes are not supportive of the hearing process, then according to one writer the attitudes should be changed by training caseworkers to be sensitive to the purposes and benefits of hearings.[192]

If the bias is due to bureaucratic pressures, however, more varied and dramatic solutions are recommended. Welfare clients could be organized to form an effective pressure group to persuade local agencies to comply with the *Goldberg* requirements and to counter the influence of the supervisor.[193] The use of active, independent ombudsmen has been suggested as an alternative to hearings.[194] Finally, action in the courts could be used to affect bureaucratic dynamics. Such litigation would be most effective if it sought to diminish peer group and supervisor pressure. The response to such litigation could prevent bad regulations from being

187. *Id.* at 467.

188. *Id.* The higher management of the welfare agency exerts similar pressures on the caseworker for similar reasons. *Id.* at 468. Scott also recognized the institutional pressures in shaping caseworker attitudes. *See* note 180 *supra*.

189. *See* notes 44-45, 171-72 *supra* and accompanying text.

190. Denvir, *supra* note 150, at 469-70.

191. Mashaw, *Welfare Reform and Local Administration*, *supra* note 150, at 821, 837-39. Centralization is not without its costs, however, mainly in terms of backlog. *See* BAUM, *supra* note 15, at 38. An alternative to centralization might be to limit determinations of eligibility strictly to considerations of financial need in order to reduce caseworker discretion as much as possible. Denvir, *supra* note 150, at 474.

192. Scott, *The Reality of Procedural Due Process*, *supra* note 150, at 761. Scott believes this must be done both by making caseworkers aware of the inadequacies of the current administration of welfare benefits and by making them realize that the client will need independent legal counsel to make the hearing successful.

193. Denvir, *supra* note 150, at 470, 477-78. For the likelihood of such organizations achieving success, see F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (1977).

194. Denvir, *supra* note 150, at 477. For an evaluation of this proposal, see notes 468-74 *infra* and accompanying text.

issued and undesirable actions from being taken in the first instance rather than attacking the regulations and actions after the fact.[195]

3. ANOTHER MODIFIED ANALYSIS—WHY ADVERSARY HEARINGS CANNOT WORK

A second group of commentators has viewed adversary hearings as inadequate safeguards to protect client rights.[196] Their descriptions of the welfare system reject three of the assumptions underlying the O'Neil analysis: the positive behavioral effects,[197] the neutral role of the hearing examiner,[198] and the lack of impact of adversary procedures on the client/agency relationship.[199]

The analyses differ, however, on whether adversary hearings produce any benefits whatsoever. One analysis holds that adversary hearings, while producing accurate decisions, do not produce positive behavioral benefits.[200] It rejects the assumption that adversary hearings will change agency behavior, assuming instead that agencies will not accept the results of hearings.[201] Local agencies, according to the analysis, will continue to consider welfare a privilege, not a right, which prevents the agencies from modifying their outlook or behavior.[202]

Furthermore, the state may not be able to change local agencies' behavior. Although the state has the authority to force compliance with *Goldberg* requirements, political realities may prevent effective exercise of its power. Most state officials are elected at the local level and face substantial political opposition if they support policies deviating significantly from local opinion.[203] The local community also contributes to public assistance funding, which gives it some influence at state levels.[204] The state must therefore remain on good terms with the local units of government and faces substantial political limits of how much compliance it can impose on strong-willed localities.[205]

Nevertheless, in this analysis the rejection of the assumption that positive behavioral effects will necessarily be achieved through adversary hearings does not imply that all benefits from hearings cannot be realized; it simply means that hearings alone cannot achieve them. When hearings

195. Denvir, *supra* note 150, at 471. *See also* note 64 *supra* and accompanying text.
196. *See, e.g.*, Mashaw, *The Management Side of Due Process*, *supra* note 150; Redlich, *supra* note 150; Rubenstein, *supra* note 150.
197. *See* notes 154-55 *supra* and accompanying text.
198. An impartial decisionmaker is implicit in O'Neil's analysis.
199. *See* notes 159-60 *supra* and accompanying text.
200. Redlich, *supra* note 150, at 68.
201. *Id.*
202. *Id.* at 72-73.
203. *Id.*
204. *Id.* For an evaluation of ombudsmen in the welfare setting, see notes 469-71 *infra* and accompanying text.
205. Redlich, *supra* note 150, at 72-73.

are combined with litigation, for example, some of the predicted benefits of hearings may become possible again. Although hearings alone may have no impact on agency behavior, they do provide a record that can be used for judicial review of agency action,[206] which may have long-run impact on agency behavior.[207]

Furthermore, hearing requests can be manipulated by clients to force agencies to negotiate with them.[208] The relatively small amount of resources allocated to the hearing process means that only a limited number of hearings can be held. If a mass filing of claims can be organized, the existing hearing framework will be overloaded and unable to carry all requests through to hearings. Pressure would then be brought to bear on local agencies to negotiate withdrawals acceptable to the appealing clients, in order to prevent complete disruption of the hearing system.[209]

In contrast to the limited benefits of hearings seen in the preceding analysis, other commentators view adversary hearings as largely unworkable in the welfare setting. One critic sees a fundamental conflict for the hearing examiner arising from the requirements of the welfare laws to provide benefits for all those eligible while denying benefits to the ineligible.[210] This aspect of the law imposes an affirmative duty on the hearing examiner to implement the program. Unlike a judge, the hearing examiner cannot remain neutral and wait for the truth to emerge from the conflict between the parties; he must seek it himself.[211]

Two possible results can arise from this analysis. First, the impossibility of the examiner remaining neutral means that the adversary system cannot function properly, since it presupposes a neutral, noninquisitorial decisionmaker. Thus the adversary hearing is inadequate for the welfare setting.[212] Second, a similar result is reached by a more extreme interpretation of the conflict of interests facing the hearing examiner. It may be that the relationship between the client and the agency is so fundamentally adversary that the examiner cannot give an impartial judgment—not

206. *Id.* at 74.

207. *Id.* at 78. Redlich believes that a true change in agency policy occurs only when the agency regards a client's problem with eligibility as an agency problem, not a case of the client attacking the agency. *Id.*

208. *Id.*

209. *Id.* at 75, 78. *See also* BAUM, *supra* note 15, at 58.

Redlich, *supra* note 150, found a cycle of negotiation and confrontation in the Nassau County, New York, welfare office. Welfare clients, with the assistance of legal aid attorneys, would have an initially successful series of negotiations with the county agency about a disputed issue. When the agency realized that similar complaints continued to come in, it would refuse to negotiate further. The clients, again with the assistance of legal aid attorneys, would institute mass filings, forcing the agency to negotiate or face a breakdown of the hearing process. This cycle would repeat itself for every new and disputed issue. *Id.* at 78-79.

210. Mashaw, *The Management Side of Due Process*, *supra* note 150, at 779. *See also* note 177 *supra* and accompanying text.

211. Mashaw, *The Management Side of Due Process*, *supra* note 150, at 781-82.

212. *Id.*

because he assumes an inquisitorial role, but because he is necessarily biased against the client by the bureaucratic realities of the welfare agency.[213] Again, the assumption of a neutral decisionmaker is fundamental to the anticipated benefits; without it, these benefits cannot occur.[214]

A final concern expressed by the commentators is that hearings are simply not feasible because they adversely affect the delicate client/agency relationship.[215] This analysis gives much greater weight to the costs of an adversary hearing in terms of the client/agency relationship than O'Neil did in his analysis.[216] By this analysis, even if clients are aware of their rights to a hearing, they may be extremely reluctant to request a hearing for fear of agency reprisal.[217] Hearings when held may produce accurate results, but if clients are reluctant to use them, there will not be enough hearings held to produce the positive behavioral effects predicted by the basic model.

Despite the pessimistic view of the effectiveness of adversary hearings that the latter two groups of commentators have taken, neither group proposes to abandon every kind of review of welfare decisionmaking. Those commentators who perceive the adversary hearings as ineffective because of agency bias against clients recommend supplemental internal quality controls[218] or the creation of an intra-agency bureau, apart from the caseworkers, to process and to mediate, if possible, client complaints, and to serve generally as a clearinghouse for information.[219] Those concerned about the negative effects of adversary hearings on the client/agency relationship recommend less formal procedures, such as negotiation, rather than confrontation.[220]

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213. Rubenstein, *supra* note 150, at 91. *But see* McCormack, *The Purpose of Due Process: Fair Hearing or Vehicle for Judicial Review?*, 52 TEX. L. REV. 1257, 1291-92 (1974) (no institutional bias in welfare administration).

214. *Cf.* note 153 *supra* and accompanying text (neutrality of decisionmaker in hearing assumed in basic analysis).

215. This concern also existed in some of the pre-*Goldberg* commentary. *See* notes 66, 71-77 *supra* and accompanying text. *See also* notes 406-18 *infra* and accompanying text.

216. *See* notes 159-60 *supra* and accompanying text.

217. Rubenstein, *supra* note 150, at 69; Redlich, *supra* note 150, at 62. *See generally* Friendly, *supra* note 150.

The school setting has close, ongoing contacts between teacher and pupil that are similar to the client/agency relationship. A recent article suggests that adversary hearings may be less appropriate than informal procedures, given the cooperative nature of the student/teacher relationship. *See* Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841 (1976).

218. Mashaw, *The Management Side of Due Process*, *supra* note 150, at 791-804. For a fuller discussion of the mechanics of quality control, see notes 464-67 *infra* and accompanying text.

219. Rubenstein, *supra* note 150, at 91-92. Note that this does not differ substantially from the ombudsmen proposed at note 204 *supra* and accompanying text.

220. Kirp, *supra* note 217, thinks negotiation and cooperation are the appropriate means of settling disputes with as delicate a relationship as in the schools. *Id.* at 870-76. In the welfare setting, even Redlich, whose approach to the perceived abuses in welfare adminis-

4. SUMMARY

Observers of the administration of welfare since the *Goldberg* decision have shared the perception that the adversary hearings prescribed by *Goldberg* have not ended the perceived abuses in welfare administration. Commentators have divided into two groups, one still convinced of the basic viability of adversary hearings once certain inhibiting conditions are removed or changed, the other questioning the appropriateness of adversary hearings in the welfare context and suggesting alternative methods of review. All commentators nonetheless share, at least implicitly, the basic model set forth by Professor O'Neil as described above. They differ only in which of O'Neil's assumptions they relax. It should be noted, however, that no one commentator since O'Neil has examined all the assumptions of his analysis; rather, each has examined selected assumptions of interest to him. As yet, no critic has proposed an extensive restatement of the basic analysis, in spite of the multitude of exceptions individual critics have taken with its basic assumptions.

II. THE STUDY

The preceding part of this study sketched the considerations which led to the institution of formal hearings prior to adverse agency action and the reservations which have been expressed over the usefulness of that remedy. This part of the study begins with a description of the procedures used at such hearings in Wisconsin and the intermittent use of less formal mediation efforts. This study attempts to measure the impact of these procedural changes upon clients choosing to appeal eligibility determinations. The remaining sections describe those aspects of appeals which were identified for analysis in this study and the sampling technique which was employed.

A. Fair Hearings in Wisconsin

The AFDC program, more commonly referred to under the general heading of "welfare," is a joint venture between the federal and state

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tration is basically litigious, sees numerous advantages in informal negotiation. Negotiation is speedier than a full hearing and demands fewer legal resources, since paralegals can usually represent clients adequately in negotiation. If the caseworker's decision is based on inaccurate or incomplete information, the caseworker can easily reverse the decision. Negotiation does not exacerbate the relationship between caseworker and client to the extent that a full adversary hearing does and gives the caseworker a chance to compromise. Even if negotiation is unsuccessful, it allows the client and her representative to discover the reasons the agency is taking the action. Redlich, *supra* note 150, at 62-63.

Nevertheless, Redlich also sees disadvantages to negotiation. If the agency position is clear or rigid, time spent in negotiation is largely wasted. The caseworker/client relationship is always affected by negotiation, no matter how amicable the negotiation is. Finally, negotiation has the potential for "plea bargaining" between the caseworker and the client's representative, to the client's detriment. *Id.* at 63.

governments to provide assistance to the children of the nation's poor.[221] The Wisconsin program is supervised at the state level by the Department of Health and Social Services—Division of Family Services (DHSS-DFS).[222] Direct administration of the program is by a county department of public welfare, referred to throughout this study as the "agency." These agencies are under the jurisdiction of a county board of public welfare.[223] At the county level, the contacts with the client are almost exclusively through a caseworker, who makes eligibility recommendations which are generally followed.[224]

1. HEARING REQUIREMENTS

The Social Security Act requires that a provision for fair hearings be included in a state's AFDC program.[225] The specific minimum features of these fair hearings are defined by HEW through its regulations. These regulations conform to the due process requirements enunciated in *Goldberg*.[226] Within this general framework, DHSS-DFS has laid down the rules and principles in the Administrative Code which govern the conduct of fair hearings in Wisconsin.[227] It has defined the purposes of the fair hearings as (1) to allow evaluation of a claim by someone other than the caseworker, (2) to facilitate development of the facts so that the agency and the claimant can reach a just solution, (3) to promote uniformity of program administration, (4) to protect against "mistaken, negligent, unreasonable or arbitrary action," (5) to detect erroneous county interpretations of the law and policy, and (6) to precipitate needed changes in state policy.[228]

Certain procedures are prescribed by DHSS-DFS to comply with the federal requirements and to attain the above purposes. All clients must be notified of their right to a fair hearing and the method of obtaining it at the time of application for benefits and whenever action affecting benefits is taken.[229] No particular form is required for a request; any clear expres-

221. *See* note 2 *supra*.

222. WIS. STAT. § 49.50(2) (1975). The state agency was formerly called the State Department of Public Welfare-Division of Public Assistance.

223. WIS. STAT. § 49.51(2) (1975). 42 U.S.C. § 602(a)(3) (1970) requires a single state agency to either administer or supervise the local administration of the program. Handler & Goodstein, *The Legislative Development of Public Assistance*, 1968 WIS. L. REV. 414, 456 describes how this choice was made.

224. *See* notes 29-31, 39-43 *supra* and accompanying text.

225. 42 U.S.C. § 602(a)(4) (1970).

226. 45 C.F.R. § 205.10 (1976). *See* notes 81 and 122 *supra* for the development of the regulations in relation to the commentaries and court decisions and note 124 *supra* for the conformity of the regulations to the *Goldberg* requirements.

227. *See* WIS. ADMIN. CODE § PW-PA 20.18 (1976). DHSS-DFS gives further guidance to the conduct of the hearings through the IMM ch. III which attempts to explain and illustrate the requirements of the regulations to those working in the program.

228. WIS. ADMIN. CODE § PW-PA 20.18(3) (1976).

229. WIS. ADMIN. CODE § PW-PA 20.18(4)(a) (1976). *Accord*, 45 C.F.R. § 205.10(a)(3)-(4) (1976).

sion, oral or written, of a desire to go beyond the county grievance procedures to present her case to DHSS-DFS is sufficient.[230] That request, however, must come within 60 days of a denial of an application and within 15 days of a termination or reduction of benefits.[231] A hearing is scheduled only if the agency and the claimant cannot resolve the dispute. A request may be dismissed without a hearing only if the claimant withdraws in writing, dies, moves from the county, fails to respond to a notification that dismissal will occur if she does not take further action, or does not appear at a scheduled hearing.[232]

Hearings must be held at a time and place convenient and "easily accessible" to both the claimant and agency staff, and must be preceded by adequate notice, which includes an explanation of the procedures used.[233] The hearing is conducted by a civil service hearing examiner who has had no previous part in the dispute.[234] The hearing examiners travel from county to county within an assigned area and hearings are scheduled for the day or two during which the examiner will be in the claimant's town.[235] The claimant has the right to examine all documents and records used by the agency to support its decision, to present her case herself or be represented, to bring witnesses, to establish facts and circumstances, to make arguments and refute testimony or evidence, and to question adverse interpretations of law or policy.[236] Although these and other requirements of due process must be followed, the hearing is described as "an informal administrative procedure."[237]

There is no specified time within which the decision must be reached

230. WIS. ADMIN. CODE § PW-PA 20.18(2)(c) (1976). An oral request must eventually be put in writing and signed by the claimant, however. *Id.* § PW -PA 20.18(5). *Cf.* 45 C.F.R. § 205(a)(5)(i) (1976) (allowing states to require written requests).

231. WIS. ADMIN. CODE § PW-PA 20.18(4)(c) (1976). *Cf.* 45 C.F.R. § 205.10(a)(5)(iii), (7) (1976) (requiring "reasonable time, not to exceed 90 days").

232. WIS. ADMIN. CODE § PW-PA 20.18(5) (1976). *Accord*, 45 C.F.R. § 205.10(a)(5)(v) (1976).

233. WIS. ADMIN. CODE § PW-PA 20.18(6)(a) (1976). *Cf.* 45 C.F.R. § 205.10(a)(8) (1976) (requiring only "a reasonable time, date, and place, and adequate preliminary written notice").

234. WIS. ADMIN. CODE § PW-PA 20.18(6)(b) (1976). *Accord*, 45 C.F.R. § 205.10(a)(9) (1976).

235. Interview with Earl Buehler, Chief Attorney, Legal Section, DHSS-DFS, in Madison, Wis. (Nov. 12, 1976) [hereinafter cited as Buehler interview]; interview with Thomas Van de Grift, Hearing Examiner (1970-77), in Madison, Wis. (Feb. 17, 1977) [hereinafter cited as Van de Grift interview].

236. WIS. ADMIN. CODE § PW-PA 20.18(6)(c)-(d) (1976). *Accord*, 45 C.F.R. § 205.10(a)(13) (1976).

237. WIS. ADMIN. CODE § PW-PA 20.18(6)(e) (1976). The definition of a hearing is:

> an orderly, readily available proceeding before an impartial employee of the state agency, in which a dissatisfied claimant or his representative may present his case with the help of witnesses to show why action or inaction in his case should be corrected by the state agency; it is not an adversary proceeding, but rather a continuation of the administrative process in which the claimant invokes the responsibility of the state agency through a quasi-judicial hearing in the particular case.

Id. § PW-PA 20.18(2)(b).

after the hearing is held.[238] The decision must be solely upon the record which consists of the testimony, exhibits, and papers and is available to the claimant after the decision is reached.[239] The written decision contains a summary of the issues, applicable law, relevant facts, and reasoning leading to the action taken and is mailed to the claimant and the agency.[240]

2. DHSS-DFS INTERVENTION: MEDIATORS

Before 1969, a request for a fair hearing resulted in the entrance of a district supervisor as a "prehearing counselor or mediator."[241] These supervisors would conduct a prehearing investigation, explain the fair hearing procedures to the client, and try to mediate a settlement before sending the claim to a fair hearing.[242] Since 1968, these activities have ceased and claims have been sent directly to hearings unless withdrawn.

An exception to this direct referral to hearings was initiated as a result of a 1973 court decision which held that clients were entitled to final agency action on hearing requests within 60 days of filing.[243] Prehearing conferences were arranged for hearing requests after January 1, 1974. DHSS-DFS hoped to reduce the backlog of hearing requests through withdrawals brought about by either the client or the agency accepting the other's position as correct. These conferences were conducted by state officials who functioned as mediators between the complaining client and the agency, thereby reinstituting the pre-1969 practice. Because the backlog in the different regions[244] varied, the

238. *Cf.* 45 C.F.R. § 205.10(a)(16) (1976) (requiring a decision within 90 days of the request for a hearing) and Guerrero v. Schmidt, 352 F. Supp. 789 (W.D. Wis. 1973) (finding that this requirement could be enforced by clients).

239. WIS. ADMIN. CODE § PW-PA 20.18(7)(a) (1976). *Accord*, 45 C.F.R. § 205.10(a)(14) (1976).

240. WIS. ADMIN. CODE § PW-PA 20.18(7)(b)-(c) (1976). *Accord*, 45 C.F.R. § 205.10(a)(15), (17) (1976).

241. Handler, *Justice*, *supra* note 17, at 16, quoting from an earlier version of the IMM.

242. *Id.*

243. Guerrero v. Schmidt, 352 F. Supp. 789 (W.D. Wis. 1973). The court found that a cause of action was stated by welfare recipients seeking declaratory and injunctive relief for alleged violations of due process and the Social Security Act when hearings were not held for up to 6 months after appeals from denials of supplemental benefits had been filed. At about the same time, HEW increased the time limit for final agency action to 90 days. *See* note 122 *supra*. Three years later, the continued failure to comply with the decision resulted in a contempt citation for the Secretary of DHSS and an order to rectify the matter or pay $100 per month to each applicant denied a hearing within 90 days of a hearing request. Guerrero v. Carballo, No. 71C-470 (W.D. Wis. Dec. 28, 1976). The response to the order has been a temporary increase in the number of examiners by having regional office staff conduct hearings. Interview with Brooke Bek-gran, Quality Control Reviewer, mediator (1974-75), Madison Region, in Madison, Wis. (Feb. 23, 1977) [hereinafter cited as Bek-gran interview].

244. For administrative convenience DHSS has divided the state into five regions of adjoining counties; each region is designated by the name of the city in which the regional office is located, that is, Milwaukee, Madison, Green Bay, Eau Claire and Rhinelander.

conferences were held only in the Milwaukee,[245] Madison,[246] and Green Bay[247] regions.

In the Milwaukee region, the process continued only until the end of May 1974, and only for those hearing requests which seemed likely to be resolved through a conference.[248] The agency was contacted to determine if it had misinterpreted state policy; the client was contacted only if the agency had erred or if the client was probably without a case.[249] In the Green Bay region, all requests filed until the end of November 1974 resulted in contacts of the client and the agency to reach a resolution of the dispute.[250] In the Madison region, the process was continued until October 1975 and all clients were contacted along with the agencies.[251]

The mediation was stopped in the Milwaukee region because the limited-term employee who had been conducting the mediation quit.[252] The efforts were stopped in the other regions because the stated purpose of reducing the backlog of scheduled hearings was not being attained. It appeared to DHSS-DFS that the mediation process consumed more time in getting a request withdrawn than would be spent in simply hearing the request.[253]

The basic hearing structure introduced in 1969 constitutes a mechanism whereby clients can assert their disagreements with agency determinations of eligibility. When a client is accompanied by a representative, the hearing may become more adversarial than when the client appears on her own behalf. The brief reintroduction of mediators in 1974, on the other hand, provided a more informal means of resolving the dispute before a hearing was conducted. This study focuses on the manner in which the hearing system functioned in these three situations.

B. Methodology

The preceding sections indicate the complexity of the factors involved in Wisconsin's *Goldberg* hearings. The descriptions have pur-

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These regions should not be confused with this study's division of the state along u ban and rural lines. *See* appendix B and notes 276-79 *infra* and accompanying text.

245. The region consists of Kenosha, Milwaukee, Ozaukee, Racine, Walworth, Washington and Waukesha counties. *See* Appendix B.

246. The region consists of Columbia, Dane, Dodge, Grant, Green, Iowa, Jefferson, Lafayette, Richland, Rock and Sauk counties. *See* Appendix B.

247. The region consists of Brown, Calumet, Door, Fond du Lac, Green Lake, Kewaunee, Manitowoc, Marinette, Marquette, Menominee, Oconto, Outagamie, Shawano, Sheboygan, Waupaca, Waushara, and Winnebago counties. *See* Appendix B.

248. Phone interview with Charles Holton, Director, Milwaukee Region (Mar. 2, 1977) [hereinafter cited as Holton interview].

249. Holton interview, *supra* note 248.

250. Phone interview with Myron Zimmerman, Quality Control Supervisor, mediator (1974), Green Bay Region (Mar. 1, 1977) [hereinafter cited as Zimmerman interview].

251. Interview with Stephen Dow, Client Services Specialist, mediator (1974-75), Madison Region, in Madison, Wis. (Feb. 18, 1977) [hereinafter cited as Dow interview].

252. Holton interview, *supra* note 248.

253. Dow interview, *supra* note 251; Zimmerman interview, *supra* note 250.

posely discussed only the formal structure of the Wisconsin hearing system, and have ignored the complex human factors influencing the operation of the hearings. The reason for this is that the human factors likely to affect the outcome of hearing requests cannot be measured because the data for this study are based on the information contained in the written decisions of hearing examiners.[254] The following assumptions must therefore be made about these particular factors: (1) presented with the same case, all hearing examiners would have reached the same conclusions;[255] (2) any given representation was uniform in quality;[256] and (3) the 1974 mediators all achieved similar results.[257] In addition, despite the lengthy period of time (between 1965 and 1976) from which the data are sampled, it must be assumed that the percentage of meritorious cases entering the hearing system has remained constant over time. This last assumption is necessary to avoid completely ambiguous results.[258]

Given these implicit assumptions, this section will first identify the measurable factors likely to influence the success of a hearing request. Then, a scheme for sampling available AFDC cases will be described. Finally, to obtain some insight into how many AFDC recipients appeal

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254. *See* note 19 *supra*.

255. Hearing examiners do, of course, have personal differences which might cause them to reach different results in the same case. Experience is such a difference. DHSS-DFS hearing examiners range in experience from a thirty-year veteran of the department to attorneys who recently graduated from law school. Joel Handler, in his 1968 study of fair hearings in Wisconsin, found that more experienced district supervisors (*see* note 241 *supra* and accompanying text) tended to have more sanguine views about the fair hearing system and were somewhat less aggressive in supporting client rights than were the younger, less experienced supervisors. Handler, *Justice*, *supra* note 17, at 24-25. Experience arguably could affect more experienced hearing examiners in a similar way.

The difficulty with this assertion is that it is extremely difficult to determine the impact of personal difference among hearing examiners such as these on their decisionmaking processes. Therefore, it will be assumed that all hearing examiners would arrive at the same decision if presented with the same case.

256. *But see* notes 438-41 *infra* and accompanying text (quality of attorney representation varies widely).

257. *But see* notes 243-53 *supra* and accompanying text (different mediation procedures used in different regional offices).

258. If this assumption were not made, it would be impossible to isolate the effects of such collateral elements of the hearing process as mediators. To determine if any change in the hearing procedures has an effect, it must be assumed that all conditions except that element which changed were constant over time. This concept is often used in the social sciences; for example, economists describe this concept as *ceteris paribus* (all other things being equal) when they seek to isolate the effects of a single change. *E.g.*, W. NICHOLSON, MICROECONOMIC THEORY 43 (1972).

Future research should examine this assumption closely to determine the extent of its validity. It assuredly is not always true. *See, e.g.*, Appendix C *infra* (reduction appeals had increase in nonmeritorious appeals in 1974). However, because this study is the first comprehensive empirical evaluation of fair hearings, the assumption seems warranted in order to obtain a preliminary evaluation of the effects of changing procedures in fair hearings.

adverse decisions; calculation of the appeal rates for termination and denial of benefits will be described.

1. FACTORS AFFECTING THE OUTCOME OF HEARINGS

This study focuses on the outcomes of AFDC hearing requests and the causes for the outcomes. Four factors influencing the outcomes can be obtained from the data used in this study: (1) the county where the hearing request originated; (2) the issue presented; (3) whether the client was represented; and (4) the date of the hearing request, from which it can be determined if mediators were present.[259] But before examining what effects these factors have, it is necessary to determine how to define and measure outcomes of a hearing request.

a. Measuring outcome

The basic measurement of outcome for this study is whether recipients are successful or not. The general statistic to measure recipient success is the *overall success rate*, that is, the percentage of hearing requests (whether taken to hearing or not) resolved in favor of the recipient.[260] Variation in the overall success rate makes possible comparisons of the effects of all the factors influencing the outcome of a hearing request.

Overall success rates have their limitations, however, for they assume that all appeals are resolved by the same procedure. A more realistic approach is to recognize that appeals can be resolved by hearing or by withdrawal. Resolving an appeal successfully at a hearing very likely requires quite different tactics and skills from those needed to negotiate a successful withdrawal. Success at a hearing requires the recipient or her representative to convince the hearing examiner of the validity of the appeal; a successful withdrawal requires the recipient or her representative to convince the agency that it has acted erroneously. Thus, the likelihood of success may well be different for a hearing than for withdrawal, and the two should be analyzed separately.

By using the *hearing* and *withdrawal success rates*—that is, the percentages of those who go to hearings or who withdraw and are successful—any inherent differences in the likelihood of success at hearing or by withdrawal can be detected.[261] This may be particularly im-

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259. *See* text following note 283 *infra*.

260. Overall success rates are the sum of the percentage of hearing requests resulting in client success, either by hearing or withdrawal. It should be noted, however, that in this study the data gathered on withdrawals has an error term that makes a precise determination of the overall success rate impossible. *See* note 261 *infra*.

261. Hearing success rates are calculated by dividing the percentage of hearing requests resolved in favor of the client by the percentage of hearing requests resulting in hearings. Using the terminology in Appendix A, hearing success rates are equal to *hearing won* divided by the sum of *hearing won* and *hearing lost*.

Calculation of similar success rates for withdrawals is more complicated. Because the

portant if mediators are present or if the recipient is represented. Because of the reasons for their introduction, mediators would be expected to push recipients toward withdrawals,[262] while a representative might instead push for a hearing. In either case some change in the success rate for hearings or withdrawals would be expected.

Besides the hearing and withdrawal win rates, it is often useful to know the percentage of the hearing requests that actually resulted in hearings (***hearing rate***), irrespective of their success or failure. The hearing rate, when used in conjunction with the hearing success rate, can give a more complete explanation of changes in hearing procedures.[263] Moreover, it gives some insight into how much recipients value hearings. A high hearing rate would be consistent with recipient satisfaction with hearings as a remedy for erroneous agency action. Some requests for hearings, however, result in a scheduled hearing where the recipient does not appear or send a representative to present her case, which causes the appeal to be dismissed (*no-show*).[264] A large percentage of no-shows would be strongly suggestive of problems with the hearing procedures, since it would indicate that clients requesting hearings were unwilling or unable to carry their claim through to a hearing or withdrawal.

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data for this study was gathered from the reports of hearing examiners, *see* note 19 *supra*, the success or failure of withdrawals was often not indicated. These have been classified as *withdrawal unclear*. As an examination of the tables in Appendix A shows, many withdrawals have had unclear outcomes and are so classified.

Treatment of the unclear withdrawals is difficult. The proper treatment would be to eliminate the category by going back to the case files on each of these appeals and attempting to determine from the subsequent handling of the client whether she had been successful. Unfortunately, such a search was beyond the resources of this study.

Since eliminating the category of unclear withdrawals is impossible, some estimate must be made of how many were successful. All of the unclear withdrawals might have been unsuccessful. Treating them in this manner has the advantage of giving a completely certain, minimum success rate for withdrawals. It seems unlikely, however, that all unclear withdrawals were unsuccessful. On the other hand, it is equally unlikely that all of them were successful. A more reasonable maximum success rate can be calculated by partitioning the unclear withdrawals into the same percentages as the success rates for the clear withdrawals. This method also has its weaknesses, especially since unclear withdrawals are often much more numerous than the clear withdrawals. Nevertheless, it is the most easily calculated maximum estimate of the successes included in unclear withdrawals.

With few exceptions the differences between the minimum and maximum success rates described above are small. Unless otherwise indicated, both will be included when discussing success rates. The minimum figure will be calculated by adding the percentages of *hearing won* and *withdrawal won*. The maximum figure will be calculated by adding to the minimum figure the partitioned unclear withdrawals (the percentages of hearing requests resulting in *withdrawal unclear*, multiplied by *withdrawal won* divided by the sum of *withdrawal won* and *withdrawal lost*).

262. *See* text following note 243 *supra*.

263. *See, e.g.*, notes 326-29 *infra* and accompanying text.

264. Dismissal does not occur at the hearing. A notice is mailed to the recipient giving her 10 days in which to request rescheduling of the hearing. If she fails to contact the state agency by the end of the 10 days, her appeal is dismissed. *See* note 232 *supra* and accompanying text.

b. Fundamental determinants of outcome: issues and counties

Notwithstanding the assumption that the percentage of meritorious hearing requests is constant over time,[265] there may be fundamental variations in the likelihood of success[266] for different types of hearing requests. Hearing requests can be distinguished on the basis of two factors: the type of issue raised, and the county where the appeal originated.

Distinguishing issues is important for two reasons. First, the frequencies of the issues raised on appeal give some indication of the kind of recipient who is willing to challenge the agency.[267] Second, and more important for this study, different issues are likely to have inherently different success rates, depending on the complexity of the issues surrounding the making of the initial judgment on benefits and the potential for official abuse.[268]

There are many identifiable issues.[269] However, they may be reduced to five basic issues[270] which fall into two general categories. The first category includes appeals by recipients who are unhappy with their level of benefits. They may feel that their general level of benefits is inadequate and that the agency has inaccurately refused to increase them

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265. *See* note 258 *supra* and accompanying text.

266. Underlying the likelihood of success is the probability that the local agency is in error. Error can occur from either of two causes. First, the error may be deliberate, either by a caseworker who is "out to get" a particular client, or by a local agency rule which is in violation of state or federal regulations. Whether a local agency will tolerate hostile behavior from its caseworkers or promulgate invalid regulations depends largely upon the attitudes of the agency director, who usually sets the tone of the agency and determines local policy. Bek-gran interview, *supra* note 243; interview with Karen Brown, Dane County Welfare Rights Alliance, in Madison, Wis. (Feb. 21, 1977) [hereinafter cited as Brown interview]; interview with Neil Hanson, Review and Evaluation Supervisor, Madison Region, in Madison, Wis. (Feb. 23, 1977) [hereinafter cited as Hanson interview]. *Accord*, Denvir, *supra* note 150, at 467-68; Mashaw, *Welfare Reform and Local Administration*, *supra* note 150, *passim*; Scott, *The Reality of Procedural Due Process*, *supra* note 150, at 737.

Second, error may be inadvertant, due to the lack of expertise of the personnel determining the eligibility for or level of AFDC benefits. In Wisconsin these personnel usually have only limited training and are frequently unfamiliar with pertinent parts of the Income Maintenance Manual. Bek-gran interview, *supra* note 243; Brown interview *supra*; Hanson interview *supra*; interview with Steven Steinglass, Director of Legal Action of Wisconsin, Inc. (formerly MLS), in Madison, Wis. (Sept. 15, 1977) [hereinafter cited as Steinglass interview]. Wisconsin's experience thus seems similar to that of other states. *See* note 183 *supra*.

267. This question will only be discussed briefly in this study. *See* notes 335-48 *infra* and accompanying text.

268. *See* note 266 *supra*.

269. For example, HEW requires states to submit quarterly reports on the numbers of AFDC terminations and entry denials. The reporting form, Form SRS-NCSS-2079-I(9/73), is five pages long and lists 23 reasons for entry denial and 35 reasons for termination.

270. Two additional issues raised on appeal, slow processing and nonfinancial reasons, were originally included in the issues. From over 2000 appeals between 1965 and 1976 which were sampled, about 1.5% raised slow processing claims and 0.5% raised nonfinancial issues. A miscellaneous category, to cover any issues that did not fit into any of the other categories, made up less than 0.05% of the sample.

(*sufficiency*), or that their request for a supplemental grant has been improperly denied (*supplemental*).[271] Conversely, the recipient may feel her grant was improperly lowered (*reduction*). The second category includes appeals by people facing exclusion from the AFDC program: recipients whose aid is discontinued (*termination*), or applicants whose request for admission is refused (*entry denial*).

The characteristics of individual counties also influence the outcome for reasons similar to those of issues. Negative county attitudes toward recipients increase the likelihood that erroneous policies will be established. In addition, the willingness of recipients to challenge the local agency may vary in some systematic way among the counties.[272]

Variation among counties has been observed in previous studies.[273] A fundamental difference appears to exist between urban and rural counties. In rural counties the recipients are generally less aware of their rights and more reluctant to challenge the local agency.[274] In addition, many rural agencies have a reputation of having somewhat harsher attitudes toward welfare recipients than urban agencies, and of having caseworkers who are less well trained than their urban counterparts.[275] A primary distinction is therefore appropriate between urban and rural counties in Wisconsin, and will be observed in analyzing the data generated by this study.[276]

A further distinction is desirable among the urban counties. Metropolitan areas have characteristics peculiar to their size: a disproportionately large number of welfare recipients, high caseloads for social work-

271. Supplemental grants cover expenses beyond the initial level of the grant, such as child care expenses if the mother works or is hospitalized.

272. *See* note 266 *supra*.

273. *See, e.g.*, Mashaw, *Welfare Reform and Local Administration*, *supra* note 150.

274. *Id.*; Bek-gran interview, *supra* note 243; Brown interview, *supra* note 266; Hanson interview, *supra* note 266.

275. *See* note 274 *supra*.

276. Distinguishing between urban and rural counties in Wisconsin requires flexibility. The Bureau of the Census designates urban areas, called Standard Metropolitan Statistical Areas (SMSA), as counties with a total population of 100,000 or more and a principal city of 50,000 or more, and contiguous counties, if any, whose principal population centers are suburbs of the principal city in the SMSA. Since this definition excludes many areas in Wisconsin which serve as urban centers, a modified definition of "urban" will be used in this study. It attempts to maintain the theory of the SMSA by designating as urban those counties with a population of over 70,000 and at least one city of over 30,000 in 1970. The counties meeting these criteria are: Brown, Dane, Fond du Lac, Kenosha, La Crosse, Manitowac, Marathon, Racine, Rock, Sheboygan, and Winnebago. RAND MCNALLY & CO. 1976 COMMERCIAL ATLAS & MARKETING GUIDE 567. In addition Douglas and Eau Claire counties, with less than 70,000 total population, have been designated as urban. They have been included in the urban counties because they have cities of more than 30,000 inhabitants. The result coincides with the "Ranally Metropolitan Areas" which are defined by township lines and are central cities and suburbs of 50,000 or more or slightly less than that but serving a metropolitan function. *Id.* at 53.

With the exception of Milwaukee, Ozaukee, Washington, and Waukesha counties (*see* note 278 *infra*), the remaining counties in the state have been designated as rural. *See* Appendix B and note 291 *infra*.

ers and caseworkers, and enormous numbers of requests for fair hearings and actual hearings held.[277] For those reasons, Milwaukee, the only true metropolitan region in Wisconsin, will be analyzed apart from other urban counties. The counties will thus be divided into three[278] types: *Milwaukee, urban* counties, and *rural* counties.[279]

c. Collateral elements: representation and mediation

Once the fundamental distinctions between types of hearing requests is established, the outcome depends on the degree of adversarialness present in the hearing process. Representation and mediation would seem to represent the opposite ends of the adversary spectrum found in Wisconsin fair hearings. A representative would presumably be argumentative and give the hearing a distinctly courtlike tone, which in theory should insure the perceived benefits of an adversary hearing. On the other extreme, mediators intervene before a hearing has been held and use an essentially nonadversarial, negotiating approach.

Despite the advantages that clients with representation may have, it would not be surprising to find that most clients would represent themselves. Clients as a class lack funds to hire attorneys, and many legal aid societies feel that their attorney resources can be better utilized in areas other than welfare fair hearings.[280] Nevertheless, some attorney representation should be expected. Some private attorneys might represent welfare clients, perhaps on a *pro bono* basis. Legal services attorneys also take some cases. However, they should be analyzed separately from private attorneys, because legal services attorneys not only have more

277. *See generally* BAUM, *supra* note 15. For a description of the minimal contact most AFDC mothers in New York City have with their social workers, see S. SHEEHAN, A WELFARE MOTHER (1976).

278. A fourth region was initially included, consisting of the counties containing the suburbs of Milwaukee (Ozaukee, Washington, and Waukesha counties). These counties have a higher per capita income than Milwaukee, and it was felt that attitudes toward welfare recipients might differ significantly from those of other areas and thus create substantially different kinds of cases coming from other regions. If a large number of such cases came from the Milwaukee suburbs, they could seriously distort data from other counties. However, such fears were unjustified. The total appeals from these three counties totaled less than 3% of all appeals, and were included into the data from Milwaukee to leave only three regions and a SMSA of the entire Milwaukee area.

279. Unlike the present *a priori* division of counties, an ideal study would analyze all 72 Wisconsin counties separately, discover which ones have similar outcome statistics, and aggregate all counties with similar statistics. This grouping would allow logical explanations of county similarities to be drawn from existing data, not presumption. It would be particularly valuable because the nature of the county probably depends as much on the attitudes of its director as its demographic characteristics. *See* note 266 *supra*. But the sample size (2000) means that too little data could be gathered for each county to make comparison among the counties meaningful. A sample of 2000 would have to be spread equally over the 72 counties, amounting to about 28 appeals per county. These 28 appeals would, in turn, have to be spread over four periods and six possible outcomes, and the results would be statistically insignificant. It is therefore necessary to devise an *a priori* grouping of counties that has some intuitive logic to it.

280. Steinglass interview, *supra* note 266.

experience in welfare policies and regulations but tend to take only test cases or cases that are too complex for paralegals or the client herself to handle.[281] Of course, clients could have had representatives other than attorneys. These include welfare rights organizations, the client's social worker, or other welfare professionals.[282]

Mediators were on the other end of the adversary spectrum, attempting to negotiate withdrawals rather than insure that hearings were truly adversarial. To determine the effects of mediators, the 1969-76 period must be separated into periods corresponding to when the mediators were present. Although the mediators worked for different lengths of time in different counties,[283] for simplicity the period during which they were present will be referred to (somewhat imprecisely) as 1974. The periods before and after 1974, 1969-73 and 1975-76, will be compared to the 1974 period to determine if the ostensibly less-adversarial procedures of mediation had an effect on the recipient success rate.[284]

2. SAMPLING TECHNIQUE

Over 14,000 hearing requests were filed with the Wisconsin Department of Health and Social Services between 1965 and 1976. Examination of all 14,000 would have been both expensive and unnecessary. A random sample of 2000 was sufficient to estimate the characteristics of the 14,000.[285]

A strictly random sampling technique, however, would have created certain problems. The samples would have been evenly distributed throughout the 14,000 cases. The first problem with such a distribution is that since more hearing requests have been filed in recent years, the sample would have been disproportionately weighted toward the present. Too few data would have been produced to make meaningful comparisons between different types of procedures occurring for different lengths of time.[286]

The problem of overrepresentation of some periods was solved by partitioning the sample among the four periods being examined.[287] Five

281. *Id.*

282. In fact, very few clients were represented by these groups, and their effect on the hearing process will not be considered in much detail. *See* text following note 350 *infra*.

283. *See* notes 248-51 *supra* and accompanying text.

284. The 1965-68 period will also be examined briefly in comparison with the 1969-73 period. This comparison should give some indications of how successful the initial implementation of the *Goldberg* procedures was. *See* notes 300-33 *infra* and accompanying text.

285. Statistician's Report, *supra* note *, at 8.

286. For example, mediators were present in Milwaukee for barely 5 months. *See* note 248 *supra* and accompanying text. A strictly random sample would hardly select any data from this very important period for an important county.

287. Each hearing request is assigned a number when it arrives at the state agency. The case numbers are entered in a log with the arrival and decision dates. Statistician's Report, *supra* note *, at 8. It is thus easy to determine the number of appeals arising between any two dates by taking the difference between case numbers.

hundred cases were randomly sampled from each of the four periods: 1965-68, 1969-73, 1974, and 1975-76.

Although partitioning the sample among the periods solved some problems of random sampling, similar problems remained for imbalance among the regions. In some ways these problems were more difficult, because the hearing requests on file were not separated by county.[288] For example, Milwaukee has a disproportionately large share of Wisconsin AFDC recipients, and a large percentage of all hearing requests would be expected to originate there.[289] Like the imbalance between the periods, the anticipated share of appeals from Milwaukee could produce too few data from urban and rural areas to make valid comparisons among the regions.

The solution to regional imbalance was similar to that for period imbalance: roughly equal numbers of cases were selected from each of the three regions for each period. The mechanics of this selection were somewhat more complex, involving a two-stage sampling technique. In the first stage 1000 samples were taken, 250 from each time period, to estimate the percentages of appeals from each region. The information from the first stage is presented in Table 1.

TABLE 1

REGIONAL PERCENTAGES OF HEARING REQUESTS*

REGION: PERIOD	Milwaukee	Urban	Rural	Total
1965-68	42%	30%	27%	100%
1969-73	39%	39%	22%	100%
1974	56%	31%	13%	100%
1975-76	45%	36%	19%	100%

* The data in the urban and rural columns include data from all urban and rural counties, not just the data from southern urban and rural counties.

The data in Table 1 reflect the anticipated results. Milwaukee county generated by far the largest number of appeals; rural counties accounted for relatively few appeals, and urban counties were between the two. In the second stage of sampling, the remaining 1000 samples were taken, 250 from each period. The goal of this sample, however, was to obtain roughly equal numbers of appeals (approximately 167) from each region. At the same time random sampling had to be preserved. The solution was to record every case from the rural counties, while only recording a few

288. Statistician's Report, *supra* note *, at 8.
289. Buehler interview, *supra* note 235.

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cases from urban counties and from Milwaukee.[290] Such a scheme produced a fairly uniform balance between the three regions.

After the sampling technique was designed and the sampling had begun, information was discovered that mediators were never introduced in some of the counties. Generally the counties without mediators in 1974 were in northern Wisconsin, while those with mediators were in the south.[291] This effectively created five regions rather than three: Milwaukee, northern urban, southern urban, northern rural, and southern rural counties. A totally balanced sample, with 100 cases from each new region, would be desirable. Nevertheless, the somewhat unbalanced sample was adequate for the present work.

3. DETERMINING APPEAL RATES

As has been previously stated, this study cannot resolve the question of how AFDC clients find their way into the hearing system. However, attempts will be made to provide some insight into this question. Analysis of issues presented is one attempt.[292] Determining appeal rates of some issues is another.

In Wisconsin, quarterly data are kept on the number of terminations and entry denials for federal reporting purposes. These data have been

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290. The randomness of the sample is preserved if not every case sampled is recorded. The exact number of cases skipped depends on the proportion of all appeals that a specific region produces. The larger the proportion, the more cases that must be skipped to preserve regional balance and the higher the number of total samples which must be taken.

A more mathematical approach follows, based on Statistician's Report, *supra* note *, at 10. Roughly 167 samples from each region for each period are desired. For county j during period i, the first stage sampling has already produced m_{ij} cases. There remain $n_{ij} = 167 - m_{ij}$ cases to be sampled.

However, the randomness of the sampling must be preserved while achieving balance among the regions. This requirement means that a large number of appeals must be sampled randomly, although not all of them will be recorded.

The exact number of samples needed for the second-stage sampling of each period depends on the region with the fewest appeals. The second-stage sample size must be large enough that every case originating in the region with fewest appeals will total about 167 by the end of the sampling process. The formula for the sample size, n_{ij}, is $n_{ij} = n_{ij'}/p_{ij'}$, where j' = the region with the fewest appeals during period i, and p_{ij} = region j's percentage of all appeals for period i.

The remaining two regions will not have all their second-stage samples recorded. Instead, the recording rate for the kth region is given by $\theta_{ik} = (n_i P_{ik})/n_{ik}$. θ_{ik} indicates how many cases from region k will be rejected before recording one. To illustrate, $\theta_{ik} = 11$ means that the first ten cases sampled are rejected, while the eleventh case is recorded.

291. The urban counties where mediators were introduced in 1974 were Brown, Dane, Fond du Lac, Kenosha, Manitowac, Racine, Rock, Outagamie, Sheboyban, and Winnebago counties. Corresponding counties in rural regions were Calumet, Columbia, Dodge, Door, Grant, Green, Green Lake, Iowa, Jefferson, Lafayette, Kewanee, Marinette, Marquette, Richland, Sauk, Shewano, Walworth, Waupaca, Waushara, and Menomonie counties. Except for Milwaukee and its suburbs, the remainder of the state had no mediators after 1968. *See also* Appendix B.

292. *See* notes 267-72 *supra* and accompanying text.

broken down by county since 1969, making it possible to detect any regional differences since then and to compare post-1969 appeal rates with the appeal rates for the previous study of Wisconsin AFDC hearings.[293]

Appeal rates were based on the region in which the appeal originated and the issue and time period involved.[294] To arrive at the appeal rate, the total number of hearing requests for terminations or entry denials for each region and period was divided by the total number of termination or entry denials for the same period and region. The total number of hearing requests from a region dealing with terminations and entry denials was easy to determine. The total number of hearings during a given period had already been determined for sampling purposes,[295] as had the percentages of hearing requests originating from the different regions.[296] Multiplication of these two factors gave the total number of hearing requests from the different regions. Since the percentage of hearing requests from the regions was calculated by issue, the percentages for termination and entry denial, when multiplied by the number of appeals originating in the regions, gave the number of terminations or entry denials for that particular period.[297]

III. The Effects of Mandatory Prior Hearings

This part of the study will examine the data generated by the study of the AFDC program in Wisconsin, described in Part II, for evidence of the effects of the procedural changes discussed in Part I. The first section of this part will focus upon what the Court and commentators might have expected to find as a result of the changes made through *Goldberg v. Kelly*.[298] The second section will present a summary of the actual impact of those procedural changes in Wisconsin. The impacts will be measured generally in terms of client success through hearing requests and the frequency with which hearings result from a request. Specific attention will then be given to the types of issues that have been presented and the rate at which certain issues are appealed.[299]

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293. *See generally* Handler, *Justice*, *supra* note 17.

294. That is, whether mediators are present.

295. *See* note 287 *supra*.

296. *See* notes 285-91 *supra* and accompanying text.

297. The total number of terminations or entry denials for the region is not the appropriate statistic to use in determining appeal rates. Not all terminations or entry denials are likely to be appealed. Included in the aggregate quarterly figure are voluntary withdrawals from the program and notice to the local agency that the recipient has died or left the county. Since these are not likely to be appealed, they will be excluded from the total number of terminations and entry denials used to calculate appeal rates.

298. 397 U.S. 254 (1970). *See generally* notes 103-11, 115, 122 *supra* and accompanying text.

299. For the importance of these factors, see notes 267-68 *supra* and accompanying text.

A. Anticipated Effects of Formal Due Process Rights

The changes advocated by the commentators[300] and adopted by the Court[301] and HEW[302] were designed to make it easier to obtain and use the fair hearing process to correct any erroneous eligibility determinations. The requirement that a hearing occur before benefits are terminated or reduced was meant to insure that the client would not be incapacitated from utilizing the hearing process.[303] The formalized procedures were designed to facilitate the effective use of the hearings by the client.[304] More explicit provisions were also made for timely and adequate notice of the right to and procedures at the hearings.[305]

1. RATE OF SUCCESS

These changes in procedures were probably expected to effect an increase in the success of clients requesting hearings. The combination of notice, formal procedures, and hearings prior to adverse agency action was designed to equip the client to effectively present the merits of her claim.[306] The assumption underlying these safeguards was that without them clients with meritorious claims would sometimes fail to obtain relief through the hearings.[307] Therefore, the addition of these measures should have resulted in an increase in the successfulness of clients in their appeals.

2. METHOD OF DISPOSITION

The procedural changes were also expected to cause an increase in the use of hearings as a means of settling the disputes.[308] Clients would have better information and would be better equipped to request and pursue the hearing remedy.[309] They would not be as likely to withdraw because of intimidation, lack of resources, or a failure to understand the procedures.[310] Therefore, an increase in the proportion of requests result-

300. *See* notes 51-64, 67-70 *supra* and accompanying text.
301. *See* notes 103-11, 115 *supra* and accompanying text.
302. *See* note 122 *supra*.
303. *See* notes 67, 70, 116 *supra* and accompanying text.
304. *See* notes 57, 106-09 *supra* and accompanying text. Most commentators thought the client lacked the information, skill, and resources to assert her rights effectively without the benefit of rights to confrontation, representation, and examination of the agency's evidence. *See* notes 44, 57 *supra* and accompanying text. Not all commentators agreed, however, that clients would be able to make effective use of these procedures. *See* notes 45, 71-74 *supra* and accompanying text.
305. *See* notes 67, 103-04, 122 *supra* and accompanying text.
306. *See* notes 57, 106-09, 304 *supra* and accompanying text.
307. *See* notes 33-35, 54-55, 116 *supra* and accompanying text.
308. *See* notes 61, 101-02 *supra* and accompanying text.
309. *See* notes 57, 103-09, 304 *supra* and accompanying text.
310. *See* notes 67-70, 116 *supra* and accompanying text. Some writers, however, argued that the hearing remedy would not be utilized by nonassertive, intimidated clients. *See* notes 71-73 *supra* and accompanying text.

ing in a hearing should have occurred.

3. RATES OF APPEAL

An additional effect that the changes in procedures were probably expected to have was an increase in the rate at which eligibility determinations were appealed. The notice requirements were designed to make potential claimants more aware of their rights.[311] The requirement that hearings occur prior to the termination or reduction of benefits was intended to better enable claimants to weather the economic difficulties that would otherwise precede the hearing.[312] The anticipated increase in successful hearings was also probably expected to have an encouraging feedback into the community.[313] The cumulative effect of these factors would be a significant increase in the proportion of potential claimants requesting hearings.

4. ISSUES PRESENTED

Neither the Court nor the commentators specifically dealt with the types of issues that would be raised by an appeal of an agency decision. Their discussion centered on appeals of termination decisions[314] and therefore implied that they expected terminations to continue to generate the bulk of hearing requests. The changes HEW made in the regulations governing hearings, however, provided for an expanded range of appealable issues,[315] indicating that other issues would account for a significant proportion of hearing appeals.

B. Measured Effects of Formal Due Process Rights

The preceding section discussed the results the *Goldberg* Court and most commentators would have expected. This section will present a summary of the effects actually experienced in Wisconsin after the switch to formal procedures in 1969. The most observable criterion on which to measure these effects is the rate at which clients successfully pursued their hearing requests. Against this background, the discussion will focus upon the method by which the request was disposed of, the types of issues presented, and the rate at which certain eligibility determinations were

311. *See* notes 67, 103-04 *supra* and accompanying text.

312. *See* notes 70, 115-16 *supra* and accompanying text.

313. This factor was not specifically mentioned by the Court or commentators but could be inferred from the belief that the availability of the procedures would contribute to the clients' psychic satisfaction of fairness and accuracy. *See* note 59 *supra* and accompanying text. Such a feedback into the community resulting in additional claims has been known to occur, often quite rapidly. Steinglass interview, *supra* note 266; Van de Grift interview, *supra* note 235.

314. *See* note 50 *supra* and accompanying text. Both Goldberg v. Kelly, 397 U.S. 254 (1970) and Wheeler v. Montgomery, 397 U.S. 280 (1970) involved the termination of benefits.

315. *See* note 122 *supra* and accompanying text.

appealed. These factors provide a perspective on the success rates as well as further insights into the functioning of the hearing system.

1. CLIENT SUCCESS AND METHOD OF DISPOSITION—IN GENERAL

A compilation of the data on client success is contained in Table 2.[316] In discussing the impact of the formal procedures upon the success rate, the data from 1965-68 will be compared with the data from the immediately following period when the formal procedures went into effect. Due to the sampling technique employed,[317] that subsequent period was 1969-73 in the southern counties[318] and 1969-76 in the northern counties.[319]

A substantial variation in the level of success and the direction of change in 1969 can be observed among the regions.[320] The most drastic change occurred in Milwaukee where the success rate dropped from the highest to the lowest in the state. The other urban counties also displayed considerable changes in success rates. While the four urban counties of the northern area[321] showed a considerable increase, the southern urban counties experienced a substantial decrease in client success. The rural counties in those areas experienced similar trends, but the amount of change was smaller. Thus, the procedural changes had their greatest impact in the urbanized counties, even though the nature of that impact varied.[322]

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316. In calculating success rates, no-shows have been treated as losses. A no-show is an affirmance of the agency's position by default; no agreement between the agency and client has occurred. If the client has not appeared because she knows that she has no case or is afraid to further antagonize the agency, the no-show is more similar to an unsuccessful withdrawal than to a loss at hearing. If she simply could not get to the hearing for some reason such as illness, forgetfulness, inability to find the hearing or get a babysitter, etc., there has been a malfunctioning of the system since a hearing was desired but did not occur. In either case, no-shows represent a failure to utilize the hearing system successfully and have been treated as losses. *See also* notes 333-34 *infra*.

317. *See* notes 283-91 *supra* and accompanying text.

318. *See* notes 283-84, 291 *supra* and accompanying text.

319. *Id*. It should be noted that there is a certain degree of danger in using periods of varying length for comparison. Because of this and the relatively few appeals from the northern counties, *see* note 323-35 *infra* and accompanying text, the primary emphasis will be on the data from the southern counties.

320. Unless indicated otherwise, the word "region" will refer to the division of the state along urban and rural lines according to whether or not mediators were reintroduced. *See* note 291 *supra* and accompanying text. The divisions of the state established by DHSS-DFS will be preceded by the name of the city in which the regional office is located, *see* note 244 *supra*, i.e., the "Milwaukee region" refers to the seven-county area established by DHSS-DFS, *see* note 245 *supra*, whereas "Milwaukee" refers to the four-county region used in this study, *see* note 275 *supra*.

321. *See* Appendix B.

322. Due to the relative insignificance of the northern urban counties, *see* notes 323-25 *infra* and accompanying text, there was actually a general decline in success rates in urban areas.

TABLE 2
OVERALL AVERAGE SUCCESS RATES: 1965-68 AND 1969-73*

PERIOD:	1965-68		1969-73	
SUCCESS RATE:	Maximum	Minimum	Maximum	Minimum
[illegible]				
Milwaukee	73.37	70.78	43.07	23.35
Southern Urban	59.93	53.66	41.99	37.88
Southern Rural	54.00	47.05	42.22	40.74
Northern Urban	78.94	78.94	64.01†	56.14†
Northern Rural	60.96	33.96	45.97†	37.80†

* *See* note 261 *supra* for the calculation of maximum and minimum success rates.
† This data was gathered for the 1969-75 period rather than just the 1969-73 period. *See* text accompanying notes 317-19 *supra*.

Given the relative numbers of appeals which arise in the different regions, however, it is clear that the overall effect of the procedural changes upon client success was negative. Milwaukee, which experienced the greatest drop, accounted for approximately one-half of all hearing requests.[323] The southern urban counties, which also had a large drop in client success rates, accounted for another one-quarter of hearing requests.[324] Thus those counties which showed negligible or positive effects resulting from the procedural changes made up only a small segment of the number of hearing requests filed.[325]

In order to link the decline in success with the introduction of new hearing procedures, it is useful to examine the relative frequency with which the new hearings were employed. If the expected increase in the use of hearings[326] occurred, the decline in client success may indicate a miscalculation by the Court and commentators of the effectiveness of the hearings as a tool to redress client complaints. Table 3 lists the percentage of appeals which ended in a hearing, a no-show, and the combination of those methods of disposition. The remainder of the appeals were withdrawn. The comparison, again, is between the events of 1965-68 and those in the following period.[327]

323. *See* Table 1.
324. Since the total urban proportion of appeals was about 35%, this is a conservative estimate of the proportion coming from southern urban counties. *See id.*
325. *See id.*
326. *See* notes 308-10 *supra* and accompanying text.
327. *See* notes 318-19 *supra* and accompanying text.

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TABLE 3

FREQUENCY OF HEARINGS AS A PERCENTAGE OF HEARING REQUESTS* 1965-68 and 1969-73

PERIOD:	1965-68			1969-73		
REGION / DISPOSITION:	Hearings	No-shows	Combined	Hearings	No-shows	Combined
Milwaukee	88.88	3.33	88.76	43.11	33.15	88.26
Southern Urban	38.48	1.33	31.81	88.71	33.37	84.38
Southern Rural	88.84	1.38	31.81	78.37	9.36	78.83
Northern Urban	71.83	8.88	71.83	88.1†	13.3†	88.1†
Northern Rural	88.88	3.77	84.71	88.1†	8.8†	78.8†

* The data listed under "Hearings" are the percentages of all appeals which resulted in hearings; the data under "No-shows" are the percentages of appeals resulting in no-shows. The data under "Combined" are the sums of the data listed under "Hearings" and "No-shows."

† This data was gathered for the 1969-76 period rather than just the 1969-73 period. *See* text accompanying notes 317-19 *supra*.

Because the major share of hearing requests came from Milwaukee, the overall figures do not show the expected increase in the use of hearings following the procedural changes in 1969.[328] Milwaukee and the northern urban counties had a large drop in the percentage of appeals disposed of by hearing. There was an increase in hearings in the other parts of the state, but those areas accounted for less than one-half of the total appeals.[329]

Throughout the state, the proportion of appeals ending in a no-show[330] significantly increased. The Court and commentators did not address the problem of no-shows, but, given the purpose of making the hearing system a more effective check on erroneous eligibility determinations,[331] a sharp increase in the proportion of clients failing to appear at their scheduled hearings would not have been expected. Interestingly, the increase in no-shows was greatest in the urban centers.[332]

328. *See* notes 308-10 *supra* and accompanying text.
329. *See* Table 1.
330. *See* note 316 *supra*.
331. *See* notes 28, 55, 62-63, 69, 116 *supra* and accompanying text.
332. The examples used by the commentators involved urban welfare agencies. *See* note 50 *supra*. Similarly, Goldberg v. Kelly, 397 U.S. 254 (1970) and Wheeler v. Montgomery,

It is useful to consider a no-show to be another kind of hearing rather than a kind of withdrawal.[333] Combining the hearing and no-show data in order to get the total percentage of appeals which were not settled before a hearing, a pattern which is slightly different from that for attended hearings is observed. The procedural changes did not actually change the proportion of appeals which were not settled before a hearing in Milwaukee and the northern urban counties, even though far fewer actually resulted in a hearing. In the rest of the state, the increases noted in hearings were amplified by the increases in no-shows so that more than three-quarters of all requests were not withdrawn.

Therefore, a greater proportion of appeals were scheduled for a hearing after the procedural changes in 1969. At the same time, the successfulness of client appeals declined.[334] This combination suggests that the new formal hearings were not the effective remedy they had been portrayed to be.

2. APPEAL RATES AND ISSUES PRESENTED—CHARACTERISTICS OF THE CLIENT WHO APPEALS

The majority of courts and commentators have not addressed directly the questions of how many clients will appeal adverse agency action or what kinds of issues are likely to be presented on appeal.[335] The implication they give is that clients will be likely to appeal when they feel the local agency has taken erroneous action against them.[336]

However, a small minority of critics has argued that whether a hearing will be requested depends less on error than on the psychological

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397 U.S. 280 (1970) arose from the operations of the welfare system in New York City and Los Angeles and thus provided a large metropolitan area as the factual situation in which the Court's decision was grounded. Since the Court and commentators had urban areas in mind and did not talk about no-shows, the dramatic rise in no-shows may reflect one of the major flaws in their rationale. That flaw may be a tacit assumption that clients, even in urban areas where the program may be more bureaucratized, will have sufficient information, opportunity, and determination to follow through on their hearing requests. *See* note 316 *supra*.

333. The important distinction is whether formal or informal means were used to dispose of the request. When the appeal is withdrawn, the client and the agency have been able to agree on how the matter should be handled without employing the full range of procedural safeguards which were available. A no-show involves no agreement between the client and the agency; but for the failure of the client to appear at the hearing, the full panoply of hearing rights would have been utilized.

334. Since the overall success rates include successful withdrawals, success at hearings was even less. *See* Appendix A, series 1.

335. *See* notes 314-15 *supra* and accompanying text.

336. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 253, 263 (1970) (hearings important to insure that erroneous agency action will not "deprive an eligible recipient of the very means by which to live.") The *Goldberg* Court did recognize that ineligible clients might request hearings to prolong their benefits, but thought this would not be a problem if hearings were held promptly. *See* notes 103-04 *supra* and accompanying text. Implicit in the Court's holding on this point is the perceived deterrent effect of adversarial hearings. *See* notes 154-55 *supra* and accompanying text.

characteristics of the client who requests a hearing.[337] They theorize that most recipients or applicants are reluctant to challenge agency action for fear of jeopardizing their present or future relationship with the agency.[338] Under this analysis, hearings will be requested for the most part by only the most assertive clients, who are willing to risk possible damage to their relationship with the agency. Thus, although the hearing system would detect some of the errors by local agencies, the hearing requests would not be representative of agency error. This would occur because less assertive clients would tend to be unwilling to risk damage to their relationship with their agencies and would probably not appeal erroneous action unless their situation were extremely critical.[339]

The appeal rates for terminations and entry denials since 1969,[340] presented in Table 4, give some support to this minority view. Though appeal rates are small by absolute standards, their size alone is not dispositive of a reluctance of AFDC clients to appeal.[341] However, when appeal rates are compared to Wisconsin quality control data, it seems very likely that only a small fraction of agency errors result in a hearing request by the aggrieved client.[342]

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337. *See, e.g.*, sources cited in notes 71-73 *supra*.

338. *See* notes 73 *supra*, 408-13 *infra* and accompanying text.

339. *See* note 71 *supra* and accompanying text.

340. DHSS-DFS no longer has information on teminations and entry denials before 1969 on a county by county basis. *See* note 293 *supra* and accompanying text.

It should also be noted that the data in Table 4 represent the appeal rates for all urban and rural counties, not just the southern counties where mediators were introduced in 1974. For this reason, appeal rates cannot be calculated for urban and rural counties for the periods after the introduction of mediators in 1974. Statistician's Report, *supra* note *, at ch. V.

341. These appeal rates agree with those cited in other studies. *See, e.g.*, Mashaw, *The Management Side of Due Process*, *supra* note 150, at 784-85 & n.35. They are, however, somewhat higher than the appeal rates found in Wisconsin AFDC program between 1945 and 1965. Handler, *Justice*, *supra* note 17, found appeal rates of 0.4% for terminations and 1.2% for entry denials. *Id.* at 20. The methods used in this study for estimating the appeal rates probably account for the difference. Handler's appeal rates were for the entire state and not divided on an urban/rural basis. This would tend to depress the state average, because Milwaukee county, which makes up a large percentage of hearing requests (*see* Table 1), has a lower appeal rate for terminations and entry denials than do the other counties (*see* Table 4). Moreover, if Handler included the terminations or entry denials unlikely to result in appeals in his calculations (*see* note 297 *supra*), his appeal rates would naturally be lower.

342. In 1973 DHSS-DFS began taking statewide samples every 6 months of 1244 families receiving AFDC. Three categories of error have been determined—"ineligibles," "overpayments," and "underpayments." Ineligibles occur when it is determined that no one in the family is eligible for benefits. Overpayments occur either when the grant has been miscalculated or when some but not all of the members of the family are ineligible. Underpayments occur similarly through miscalculations or failures to include eligible family members. Only underpayment situations are likely to generate meritorious appeals and so are the only figures useful for this study. The percentage of sampled families being underpaid steadily declined from 16.5% to 5.2% for the period of April 1973 through December 1976.

TABLE 4
APPEAL RATES*

ISSUE: PERIOD	REGION: Milwaukee	Urban	Rural
Termination: 1969-73	1.09%	2.43%	2.61%
Termination: 1974	3.99%	no data	no data
Termination: 1975-76	1.80%	no data	no data
Entry Denial: 1969-73	6.14%	7.43%	8.90%
Entry Denial: 1974	10.40%	no data	no data
Entry Denial: 1975-76	2.10%	no data	no data

* *See* notes 292-97 *supra* and accompanying text for the calculations of appeal rates.

The statistical data on issues presented at Wisconsin fair hearings give further support, though not conclusive proof, to the minority view.[343] After the *Goldberg* requirements were instituted in 1969, the majority of AFDC appeals in most Wisconsin counties were brought by recipients raising sufficiency, supplemental, or reduction issues. This tendency can be seen in Table 5, column (4). The benefits of these recipients will continue at some level regardless of the success of their appeal. Thus, Wisconsin AFDG appeals tend to be filed by assertive recipients willing to risk their ongoing relationship with their local agency.

Direct comparison of these figures with the appeal rates calculated in this study is not possible because the quality control data is not further differentiated. When a family member has been erroneously excluded from the program, a termination or entry denial appeal could be filed. When the grant is too small, a sufficiency, reduction, or supplemental benefits claim could arise. The quality control underpayment figure represents the aggregate of these two types of underpayment and there is no way to tell what proportion is due to each type of error. It can be concluded that the error rate for terminations and entry denials is some fraction of the total underpayment error rate. Given the appeal rate for Milwaukee terminations in 1974 and 1975-76 of 3.9% and 1.8% respectively, that fraction would have to be less than one quarter in order for the termination appeal rate to be greater than or equal to the termination error rate, assuming that the error rate was no higher for Milwaukee than for the state as a whole. Since termination constituted 17.48% of Milwaukee appeals in 1974 and 20.92% in 1975-76, it is reasonable to assume that the fraction of underpayments representing erroneous terminations was not less than one quarter. Thus, the appeal rate is probably less than or equal to the error rate. If the system were handling all potential meritorious appeals, the appeal rate would exceed the error rate since some nonmeritorious appeals are inevitable. Therefore, the quality control error rates indicate that appeal rates should be higher to assure that meritorious claims are asserted.

The information on quality control error rates was obtained from James Howman, State Quality Control Coordinator, in Madison, Wis. (Jan. 19, 1978).

343. Alternative explanations of the frequency of issues presented could undoubtedly be formulated. However, they will not be proposed here because the question of who appeals cannot be resolved using the methodology of this study. The important point is that this question has rarely been addressed. *See* text accompanying note 348 *infra*.

TABLE 5

FREQUENCY DISTRIBUTION OF ISSUES RAISED ON APPEAL*

(ROW)	COLUMN: / ISSUE: / REGION: PERIOD	(1) Sufficiency	(2) Supplemental	(3) Reduction	(4) Sum of Columns (1)–(3)	(5) Termination	(6) Entry Denial	(7) Sum of Columns (5)–(6)
(1)	Milwaukee: 1965-68	26.56	17.19	---	43.75	50.00	6.25	56.25
(2)	Milwaukee: 1969-73	59.28	17.37	4.19	80.84	10.18	8.98	19.16
(3)	Milwaukee: 1974	33.01	13.59	28.16	74.75	17.48	7.77	25.25
(4)	Milwaukee: 1975-76	38.30	15.60	18.09	71.99	20.92	7.09	28.01
(5)	Southern urban: 1965-68	54.88	6.10	2.44	63.42	14.63	21.95	36.58
(6)	Southern urban: 1969-73	37.14	21.43	7.14	65.72	17.14	17.14	34.28
(7)	Southern urban: 1974	28.48	13.94	20.00	62.43	22.42	15.15	37.57
(8)	Southern urban: 1975-76	32.08	11.32	15.09	59.49	21.70	19.81	40.51
(9)	Southern rural: 1965-68	30.51	6.78	6.78	44.07	33.90	22.03	55.93
(10)	Southern rural: 1969-73	27.78	16.67	7.41	51.85	25.93	22.22	48.15
(11)	Southern rural: 1974	21.43	13.10	13.10	47.62	20.24	32.14	52.38
(12)	Southern rural: 1975-76	23.53	---	26.47	50.00	17.65	32.35	50.00
(13)	Northern urban: 1965-68	13.16	13.16	---	26.32	34.21	39.47	73.68
(14)	Northern urban: 1969-76	14.04	17.54	12.28	43.86	40.35	15.79	56.14
(15)	Northern rural: 1965-68	24.53	---	---	24.53	45.28	30.19	75.47
(16)	Northern rural: 1969-76	32.78	8.22	15.13	46.06	33.22	20.72	53.94

* The data in this table represents the frequencies of the major issues as a percentage of all appeals. Column (4) is the sum of columns (1), (2), and (3), and represents the frequency of issues where the clients continued to receive some level of AFDC benefits, regardless of the success or failure of their appeal. Similarly, column (7) is the sum of columns (5) and (6), which are the issues where the clients received no further AFDC benefits if they lost the appeal.

This tendency varies among the different types of counties. Since 1969, over 70% of the appeals from Milwaukee, Wisconsin's only metropolitan area, have been filed by recipients who will continue to have a relationship with the county agency after their appeal is resolved. Urban counties have a somewhat lower percentage of such appeals, 60%. The percentages are lowest in the counties with the least population—northern urban, and southern and northern rural counties, which have between 45% and 50% of such appeals.

Two factors probably account for this variation among the counties. First, the relationship between the agency and the recipient in counties with smaller populations is likely to be closer.[344] Second, recipients are more likely to have greater exposure to information about the hearing process in the more urban counties, where there is a greater concentration of AFDC recipients and easier access to welfare rights groups and legal services organizations.[345] Many critics have observed that most clients are uninformed about the hearing process,[346] and it is reasonable to expect that those with greater information would be more sensitive to the variety of issues that can be raised at a hearing as well as being more likely to appeal.[347]

Further discussion of the significance of appeal rates and the frequencies of issues presented, and how they relate to the kind of clients who will avail themselves of hearings, is beyond the scope of this study. At this point it is sufficient to note that most commentary and court opinions have not considered this question. For a full understanding of the merits of requiring hearings in the welfare system (or in any other context), the question must be addressed explicitly, especially since the data from Wisconsin is not inconsistent with the view that only assertive clients will request hearings with any regularity.[348]

IV. Effect of Representation and Mediation

The type of hearing procedures used is not the only factor which can affect the client's ability to use the administrative remedy effectively. This part of the study addresses the potential for resources outside of the hearing to assist the client in pursuing her administrative remedy suc-

344. *See* note 411 *infra*.

345. Bek-gran interview, *supra* note 243; Steinglass interview, *supra* note 266.

346. *See* notes 44-45, 171-72 *supra* and accompanying text.

347. The tendency of urban clients to appeal more adverse agency decisions raising sufficiency, supplemental, or reduction issues than their rural counterparts is opposite from the tendency of rural clients to appeal terminations and entry denials. *See* Table 4. However, this is consistent with the explanation given in the text. If rural clients were reluctant to jeopardize their relationship with the agency, they may well have tended to appeal terminations and entry denials where the agency's actions would have caused them severe hardship. While not explaining completely the higher rural appeal rates of terminations and reductions, this reasoning at least offers a partial explanation.

348. *See* note 343 *supra*.

cessfully. The first section examines the effectiveness of attorneys as representatives of clients in their appeals. The second section addresses the impact of the introduction of mediators into the administrative process at some point after an appeal is filed and before a hearing is scheduled.

A. Attorney Representation

For the entire study period, approximately 87% of all clients requesting hearings represented themselves.[349] Only 6.5% had an attorney representing them.[350] The remaining 6.5% were represented by welfare rights organization members, social workers, or other professionals with less than 4.5% in any one category. These latter categories will not be considered further. The low percentage of attorney representation itself is an interesting statistic since it indicates that, regardless of the emphasis placed on attorneys as an additional resource for welfare clients, they have been sparingly used and probably have had only a marginal effect at best. The remainder of this section will focus on the nature of that marginal effect in Wisconsin by comparing the appeals of self- and attorney-represented clients according to the method of disposition, success rate, and issue presented.

The method by which appeals were disposed of provides the most striking difference based on representation. Clients with attorneys were more likely to go to hearings than those who represented themselves. In all areas and periods, with the exception of the southern counties in the 1965-68 period,[351] over 90% of all clients with attorneys went to hearings, whereas only 42-61% of self-represented clients went to hearings. Correspondingly, only a few clients with attorneys withdrew or failed to appear while self-represented clients were as likely to withdraw or fail to appear as to go to a hearing.[352]

A qualification must be added to this and other interpretations in this section; a selective process may be occurring and therefore influencing these figures. It is possible that only clients who are certain that they will

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349. The categories of representation identified in the study were "self," "Milwaukee Legal Services (MLS) attorney," "non-MLS attorney," "welfare rights organization," "social worker," and "other professional." Those who were accompanied by a person who was not especially qualified by profession to represent them were treated as self-represented. Such accompaniment may or may not have appeared in the hearing decision whereas other, more qualified representatives would appear as part of the hearing record. Thus, an unreliable category of "other representative" was not created. *See* Appendix A. No other category had more than 5% of the sample and only non-MLS attorney and welfare rights organization had more than 2%.

350. This general category is the combination of the MLS and non-MLS attorney categories and is necessitated by the need to obtain a sample of sufficient size for detailed analysis. *See* note 349 *supra*.

351. In the southern area in the period 1965-68, 81% of those with attorneys went to hearings whereas 49% of those representing themselves went to hearings. *See* Appendix A, series 3.

352. *See* Appendix A, series 3.

go to a hearing will obtain an attorney. Attorneys may refuse to represent some clients. Attorneys may also have been involved in some situations as counselors to clients who appeared in the records as self-represented,[353] especially clients who withdrew. The indication that attorneys were involved in some cases which were eventually withdrawn, however, shows that such an inadequacy of records was not systematic.

Comparing the success rates of clients with different representations produces surprisingly small differences. Contrary to what several commentators would have predicted,[354] during the entire study period throughout the state attorney-represented clients were only slightly more successful than those representing themselves. Table 6 contains four different means to calculate client success.[355] Although clients with attorneys appear to be more successful under all but one of the means of calculation, the differences in success were not as great as might have been expected. Given the purported argumentative and analytical expertise of the profession, these small differences may indicate an inability to employ such skills fruitfully in the context of welfare hearings.[356]

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353. This is a regular practice for clients of MLS. If the attorney felt that there was a good chance that the client would be able to make her arguments without representation, the attorney would give the client whatever advice was appropriate but not accompany her at the hearing. Steinglass interview, *supra* note 266.

354. *See* Graham, *supra* note 28, at 910-14; Scott, *Administrative Responsibility*, *supra* note 28, at 362; *Right to Counsel*, *supra* note 28, at 474; *Welfare*, *supra* note 28, at 233-34; *Texas Welfare*, *supra* note 28, at 240.

355. The data in Table 6 was for all regions and periods and was calculated by the methods described in note 261 *supra*. Column (1) is the hearing success rate. Column (2) is the result of dividing the *hearing won* plus *withdrawal won* by the sum of *hearing won*, *hearing lost*, *withdrawal won*, and *withdrawal lost*. It gives the success rate for hearings which have been held and withdrawals which have been clearly decided (*withdrawal won* and *withdrawal lost*). Column (3) is the maximum success rate. Column (4) is the minimum success rate.

356. There are at least two possible explanations for this phenomenon. First, attorneys procurred through Judicare or legal aid offices other than MLS do not specialize in welfare law and so are no more familiar with the system than the clients. They are confronted by a confusing set of statutes and regulations which may require more time to master than the attorney has. Moreover, their training and normal practice may encourage them to use hearings rather than less formal, less "judicial" methods of settling the dispute. Second, all attorneys, especially those from MLS, *see* note 353 *supra*, may be following a selective pattern for representing clients which will result in data significantly different from what would be obtained if representation occurred on a purely random basis. Thus, an MLS attorney will accompany a client at a hearing, thereby making the client attorney-represented, only if it is felt that she does not have a very strong case or if MLS wants to use the case as a vehicle for changing existing state policy. Steinglass interview, *supra* note 266. In either case the appeal will probably lose and MLS will appear to be ineffective. In fact, however, more promising or less trend-setting appeals will also be given advice but no attorney will appear at the hearing and the case will be recorded as self-represented. Thus, the apparent ineffectiveness of attorneys in accomplishing some of the same goals may be due to an inability to determine accurately when an attorney has actually been involved rather than any real ineffectiveness.

TABLE 6
SUCCESS RATES BY REPRESENTATION*

COLUMN:	(1)	(2)	(3)	(4)
DISPOSITION:	Hearings Held	Hearings Held + Decisive Withdrawals	Unclear Withdrawals	All Types of Disposition
REPRESENTATION				
Attorney	49.31	47.96	47.96	47.63
Self	44.93	53.64	43.86	35.34

* *See* note 355 for the calculations of the various success rates.

The relative success of attorney- and self-represented clients varied as appeal procedures changed. Table 7 presents a breakdown of the third column of Table 6 according to periods. The change between the first two periods is understandable. In 1969 procedures became more formalized, creating a hearing atmosphere to which attorneys are more accustomed but to which poor, uneducated people are not. The higher success rate for self-represented clients in 1974 when mediators were present, higher than in either of the adjacent periods, lends support to the proposition that self-represented clients have difficulty handling the formal procedures.

The success of clients with attorneys in 1974 is not so readily explained. The reasons for a mediator's beneficial impact do not apply to a client with an attorney. That client should be adequately informed and able to present her case logically at a hearing whether a mediator is present or not.[357] A more likely explanation is seen when the MLS and non-MLS attorneys are differentiated.[358] The non-MLS attorneys had a fairly consistent winning average at hearings and actually did better in 1969-73 and after 1974. MLS lost the majority of its appeals in those two periods and effectively countered the successes of the non-MLS attorneys. In the short period when mediators were present in Milwaukee, however, MLS won four of the five appeals sampled which it took to hearing. As a result, a higher average win rate was realized by clients with attorneys. Similarly, the average after 1974 was reduced by the inability of MLS to win more than two of the sixteen appeals sampled which it represented in that period. Thus, the fluctuations in attorney

357. *Cf.* note 408 *infra* and accompanying text (general role of mediators). *But cf.* paragraph accompanying note 413 *infra* (mediation ineffective at increasing success of termination and entry denial appeals).

358. *See* Appendix A, series 3 for the data on the two types of attorneys.

TABLE 7
SUCCESS RATES BY REPRESENTATION AND PERIOD: SOUTHERN COUNTIES*

PERIOD:	1965-68		1969-73		1974		1975-76	
SUCCESS RATE:	Maximum	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum	Minimum
REPRESENTATION								
Attorney	43.43	32.58	82.17	52.17	62.50	62.50	40.00	40.00
Self	68.81	63.83	43.77	30.18	43.88	33.34	33.80	23.93

* *See* note 261 for the calculation of minimum and maximum success rates.

success rates were the product of the fortunes of MLS's test cases[359] rather than an impact of mediation.

Finally, a brief comparison between representation and nonrepresentation success can be made along the lines of the issue involved.[360] The most prominent issue for attorney-represented clients was termination, comprising 37.3% of the appeals. The remainder of the appeals were about equally divided among the other issues. Among self-represented clients, 34.6% brought issues of sufficiency and 25.6% were appealing a termination. The remainder were about evenly divided among the other issues. Comparing the overall success in appeals on the various issues there was no significant difference in success between self- and attorney-represented clients when the issue was termination or supplemental aid. Clients with attorneys had significantly higher success rates than self-represented clients, however, when the issue was entry denial, sufficiency, or reduction. This suggests that issues of sufficiency may account for the lower overall success of self-represented clients. Self-represented clients raised issues of sufficiency much more frequently and had a much poorer record on this issue than clients with attorneys. However, a selective process by attorneys may have occurred.[361]

While several of the commentators have stressed the importance of having an attorney at a hearing,[362] attorneys have not actually appeared in

359. *See* note 356 *supra*.
360. *See* Appendix A, series 2 for the data on the issues raised.
361. For example, attorneys may have been more reluctant to represent a client on an issue of sufficiency than over a termination because the smaller amount of money involved made it seem less important.
362. *See* note 354 *supra*.

a significant number of cases. Some of the overall data indicate that the effect of having an attorney is not altogether positive, while other data indicate that attorneys are helpful. Because of the small number of cases in which they appear, no conclusion can be drawn from the data as to whether greater effort should be made to provide attorneys. For better or worse, attorneys have not been a significant factor in this study and subsequent discussion assumes that the client is self-represented.

B. Mediation

A second element collateral to the basic AFDC hearing system was the introduction of mediators in 1974. A federal court order to pay damages for delays in processing certain hearing requests forced DHSS-DFS to try to resolve other hearing requests short of a hearing.[363] Mediators were introduced into the AFDC hearing process with the anticipation that they could obtain withdrawals of a large number of AFDC cases, thereby allowing hearing examiners to clear their dockets of the cases covered by the court order.[364]

Judged only by the reasons for their introduction into the hearing process, mediators were for the most part unsuccessful.[365] For most AFDC appeals they failed to increase withdrawals as anticipated, although exceptions did of course occur. In some cases, mediators increased withdrawals, as in reduction and entry denial appeals originating in urban counties.[366] In other cases, AFDC clients simply did not take their appeals to hearing as often after 1973 as they had between 1969 and 1973.[367] However, with the exception of termination appeals from Milwaukee,[368] none of this decline in hearings seems to be due solely to the presence of mediators.[369]

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363. *See* note 243 *supra*.

364. *See* text following note 243 *supra*.

365. Because the anticipated differences between metropolitan, urban, and rural counties failed to materialize, the general descriptions of procedural dispositions or success movements cover the entire area where mediators were active, unless the text otherwise indicates. *Cf.* notes 273-79 *supra* and accompanying text (differences expected between Milwaukee, urban, and rural counties).

366. Mediators in urban counties increased the percentage of reduction and entry denial appeals resulting in withdrawal by lowering the no-show rate as well as by moving appeals from hearing to withdrawal. *See* Table 8, columns (6)-(8), rows (7)-(9) and (13)-(15).

367. Sufficiency appeals in all regions show long-term declines in hearing percentages by the 1975-76 period, with withdrawals and no-shows rising. *See* Table 8, rows (1)-(3). Termination appeals in Milwaukee and rural counties after 1973 have decreasing percentages of hearings and increased percentages of withdrawals. *See* Table 8, rows (10)-(12).

368. *See* notes 381-82 *infra* and accompanying text.

369. In order for the mediators to be solely responsible for the decline in hearing rates, the percentages of hearings as a part of all appeals would be expected to rise once mediators were withdrawn. For the issues mentioned in note 367 *supra*, this did not occur. *See* note 367 *supra* and Table 8.

TABLE 8

PROCEDURAL DISPOSITION OF AFDC APPEALS: SOUTHERN COUNTIES*

	REGION:	MILWAUKEE				URBAN				RURAL			
	COLUMN:	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
	PERIOD:	1965-68	1969-73	1974	1975-76	1965-68	1969-73	1974	1975-76	1965-68	1969-73	1974	1975-76
(ROW)	ISSUE: DISPOSITION												
(1)	Sufficiency: Hearing	32.35	23.23	29.41	15.74	28.29	48.04	25.53	14.70	33.34	66.67	55.56	15.74
(2)	Sufficiency: Withdrawal	55.89	42.43	23.53	41.67	68.89	13.46	31.92	29.42	61.00	6.66	27.77	41.67
(3)	Sufficiency: No-show	11.76	34.34	47.06	42.59	2.22	38.46	42.55	55.88	5.56	26.67	16.67	42.59
(4)	Supplemental: Hearing	22.73	93.10	85.71	93. 8	40.00	93.33	91.31	100.00	100.00	88.89	81.82	---
(5)	Supplemental: Withdrawal	77.27	6.90	14.29	6.82	60.00	6.67	4.34	0.00	0.00	11.11	18.18	---
(6)	Supplemental: No-show	0.00	0.00	0.00	0.00	0.00	0.00	4.35	0.00	0.00	0 00	0.00	---
(7)	Reduction: Hearing	---	28.58	93.10	98.17	0.00	70.00	45.45	87.50	75.00	100.00	81.82	98.19
(8)	Reduction: Withdrawal	---	14.28	6.90	3.93	100.00	10.00	45.46	12.50	25.00	0.00	9.09	3.93
(9)	Reduction: No-show	---	57.14	0.00	5.88	0.00	20.00	9.09	0.00	0.00	0.00	9.09	5.88
(10)	Termination: Hearing	96.88	64.70	38.89	42.37	33.33	50.00	51.35	28.09	66.00	57.14	41.17	42.37
(11)	Termination: Withdrawal	3.12	35.30	27.78	45.77	66.67	37.50	32.43	47.82	33.00	35.72	41.18	45.77
(12)	Termination: No-show	0.00	0.00	33.33	11.86	0.00	12.50	16.22	26.09	0.00	7.14	17.65	11.86
(13)	Entry Denial: Hearing	75.00	60.00	50.00	55.00	33.33	64.17	40.00	57.14	30.77	66.67	51.85	55.00
(14)	Entry Denial: Withdrawal	25.00	13.33	25.00	30.00	66.67	12.50	44.00	14.29	53.85	33.33	29.63	30.00
(15)	Entry Denial: No-show	0.00	26.67	25.00	15.00	0.00	33.33	16.00	28.57	15.38	0.00	18.52	15.00

* The data in this table presents the procedural dispositions, irrespective of success, of appeals arising in the southern counties (Milwaukee, southern urban, and southern rural). For example, the data presented in column (1), rows (1), (2), and (3) shows that for equal appeals coming from the Milwaukee region between 1965 and 1968 challenging the sufficiency of the grant, 32.35% went to hearing; 55.89% were withdrawn; and 11.76% were scheduled for a hearing, but the clients failed to appear.

Despite the failure of mediators to increase withdrawals, their presence had a totally unexpected effect on the success rates[370] of certain types of appeals.[371] Generally success rates rose considerably where the client was already receiving AFDC benefits and would continue to receive them at some level regardless of the success or failure of her appeal. (The issues raised on this kind of appeal are classified in this study as sufficiency, supplemental, and reduction appeals.) The mediators' assignment to reduce the number of hearings apparently was unrelated to the rise in success rates; recipients raising these issues were more successful both when they took their appeal to hearing and when they withdrew.[372]

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370. For the discussion of mediators, only the minimum success rates will be used. *See* note 261 *supra*. The rationale for this is that the analysis of mediators is broken down by issues. With such a breakdown, the unclear withdrawals are by and large insignificant, and can safely be ignored.

371. Average success rates for each region can be used, but are misleading in explaining the effects of mediators. For example, the average success rate for Milwaukee rises when mediators are present. The rise ignores the *decreased* success of termination appeals and fails to account for the even greater success of entry denial appeals when mediators are removed. *See* note 380 and text accompanying notes 381-82 *infra*. Similarly, the average success rate for rural counties suggests that mediators had no effect on recipient success, when in fact sufficiency and supplemental appeals were more successful when mediators were present. *Compare* Table 11, rows (1)-(2) *with* row (6).

Average success rates are inappropriate to explain the effects of mediators because the average success rate is the summation of the success rates of the different issues weighted by the frequency of the issues. Thus a small decline in the success rate of a frequently occuring issue can outweigh large increases in the success rates of less frequent issues. If the decline in the success of the frequent issue is due to a change in eligibility policies, using the average success rates may suggest that mediators are ineffective or even detrimental to client interests and would militate against their use, either on grounds of effectiveness or interests in protecting clients. In fact, mediators might be extremely effective, but their effectiveness in some situations would not show up in the overall, average success rate. Consequently, the analysis of mediator effects will be based solely on success rates by issue.

372. This pattern was followed by sufficiency and supplemental appeals in Milwaukee and rural counties (*see* Tables 9 & 11, rows (7), (8), (12), and (13)) and for reduction appeals in the urban counties (*see* Table 10, rows (9) and (14)). Although it is not immediately obvious, reduction appeals in Milwaukee also follow the pattern. Reduction appeals resulting in hearing apparently were less successful under mediators than in 1969-73. *See* Table 9, row (9). However, reduction appeals during the 1969-73 period may well have raised different issues from those raised by reduction appeals between 1974 and 1976. Reduction appeals constituted only 4% of all AFDC appeals between 1969 and 1973, while constituting 28% of the appeals in 1974 and 18% of all appeals in 1975 and 1976. *Compare* Table 5, column (3), rows (2)-(4) *with* text accompanying note 336 *supra*. Only 28% of Milwaukee reduction appeals resulted in hearings in 1969-73; over 90% of reduction appeals between 1974 and 1976 went to hearing. *See* Table 8, columns (2)-(4), row (7). The remarkable dissimilarity in the frequency and procedural dispositions between the 1969-73 reduction appeals and those of 1974 and 1975-76 suggests that 1969-73 is not comparable with 1974-76, quite possibly because different problems of reduction were raised. *See* Appendix C. Hence, the proper comparison to determine the effects of mediators must be between 1974 and 1975-76. Viewed this way, reduction appeals were more successful both at hearing and by withdrawal in 1974 when mediators were present than when they were not.

TABLE 9
SUCCESS RATES: MILWAUKEE*

[Row]	[Success Rates: Issues]	Period: A[illegible]-68	1969-73	1974	1975-76
(1)	Overall: Sufficiency	90.89	90.16	89.98	13.09
(2)	Overall: Supplemental	77.87	37.93	64.29	40.91
(3)	Overall: Reduction	---	14.29	41.30	9.09
(4)	Overall: Termination	90.00	41.16	97.78	42.37
(5)	Overall: Entry Denial	75.00	20.67	50.00	60.00
(6)	Overall: Average	74.24	24.16	30.42	25.74
(7)	Hearing: Sufficiency	27.27	26.09	70.00	23.53
(8)	Hearing: Supplemental	80.00	37.04	58.33	36.58
(9)	Hearing: Reduction	---	50.00	40.74	10.87
(10)	Hearing: Termination	96.77	45.45	57.14	60.00
(11)	Hearing: Entry Denial	66.67	44.44	75.00	72.73
(12)	Withdrawal: Sufficiency	47.37	23.81	50.00	24.44
(13)	Withdrawal: Supplemental	76.47	50.00	100.00	100.00
(14)	Withdrawal: Reduction	---	0.00	50.00	0.00
(15)	Withdrawal: Termination	100.00	33.33	20.00	37.04
(16)	Withdrawal: Entry Denial	100.00	0.00	50.00	66.67

* The data presented in this table represent the success rates by issue and procedural disposition in the Milwaukee region between 1965 and 1976. The overall success rates, rows (1)-(5), are the success rates for issues presented, regardless of their procedural disposition. Row (6), the average success rate, gives the overall success rates for all appeals from Milwaukee, regardless of the issue raised. Rows (7)-(11) contain the success rates for clients who took their appeals to hearing; rows (12)-(16) present the success rates for clients who withdrew their claims. It should be noted that the withdrawal success rates are the minimum success rates. *See* note 261 *supra*.

The success rates of sufficiency and supplemental appeals in urban counties however, did not conform to this general pattern of increased success when mediators were present.[373] Urban success rates for sufficiency and supplemental appeals showed a continuous decline for the

373. Table 11, rows (1)-(2). Rural reduction appeals also break the pattern, being less successful in the presence of mediators. *See* Table 11, row (3). This result is probably due to changes in statewide policy. *See* Appendix C.

three periods between 1969 and 1976, which the mediators apparently could not stem. An explanation for this decline may lie in the grouping of all urban counties in Wisconsin together. The rationale for aggregating all urban counties was that they seemed likely to have similar kinds of agencies and recipients.[374] Although this assumption seemed reasonable at the time the methodology for this study was formulated, subsequent research has indicated that grouping all urban counties together may be somewhat overbroad.

TABLE 10

SUCCESS RATES: URBAN SOUTH*

	PERIOD:	1955-68	1969-73	1974	1975-76
(ROW)	SUCCESS RATES: ISSUES				
(1)	Overall: Sufficiency	48.89	38.54	23.40	11.76
(2)	Overall: Supplemental	60.00	40.00	30.43	16.67
(3)	Overall: Reduction	50.00	30.00	41.66	25.00
(4)	Overall: Termination	75.00	41.67	43.24	21.74
(5)	Overall: Entry Denial	50.00	37.50	32.00	33.33
(6)	Overall: Average	55.17	37.50	29.34	20.76
(7)	Hearing: Sufficiency	41.67	64.00	41.67	60.00
(8)	Hearing: Supplemental	0.00	42.86	28.57	16.67
(9)	Hearing: Reduction	---	28.57	26.67	28.57
(10)	Hearing: Termination	50.00	41.67	47.37	33.33
(11)	Hearing: Entry Denial	16.67	53.85	20.00	58.33
(12)	Withdrawal: Sufficiency	54.84	42.86	40.00	10.00
(13)	Withdrawal: Supplemental	100.00	0.00	100.00	---
(14)	Withdrawal: Reduction	50.00	100.00	6.67	0.00
(15)	Withdrawal: Termination	87.50	55.56	58.33	27.27
(16)	Withdrawal: Entry Denial	66.67	66.67	54.55	0.00

* *See* note to Table 9 for a description of the types of data presented in this table.

For example, an examination of Dane County (Madison) shows that its AFDC appeals are likely to differ considerably from those arising in other urban counties. The Dane county welfare agency has a reputation of being one of the most efficient agencies in Wisconsin, while taking a hard-line approach to questions of eligibility and benefit levels. The

374. *See generally* notes 273-79 *supra* and accompanying text.

agency tends to go to hearing rather than to acquiesce to client demands.[375] At the same time, Dane county welfare recipients have a reputation of being better informed about their rights and welfare policies than their counterparts in other urban counties. In Dane county, welfare recipients have greater informational resources available to them, such as the Dane County Welfare Rights Alliance (DCWRA), one of the most active welfare rights organizations in the state.[376] The population of the county is more than 290,000,[377] which means that client resources such as DCWRA can provide more effective coverage to all recipients than could a similar organization in a larger county like Milwaukee.[378]

This combination of a somewhat recalcitrant county agency and sophisticated recipients suggests two important differences in Dane county's sufficiency and supplemental appeals from those arising in other counties. First, Dane county may account for considerably more of those appeals than do other counties. Second, the appeals may differ substantially from those arising in other urban counties. Less sophisticated recipients are more likely to raise fairly simple factual issues. Sophisticated recipients, on the other hand, raise complex issues of policy which often have not been resolved by the state agency. Complex policy issues are inherently less likely to succeed simply because they are at the edge of established welfare law.[379] If this characterization of appeals from Dane county is correct, and if Dane county appeals make up a large percentage of appeals from urban counties, then the observed decline in success rates of sufficiency and supplemental appeals from urban counties becomes more understandable.

Unfortunately, the data from Dane county were not separated from that from other urban counties when the cases were sampled. Interpretation of the apparent anomaly of declining success rates for urban sufficiency and supplemental appeals is therefore ambiguous. Future empirical research rather than speculation may help to clarify this question; for the time being, it is sufficient to note a possible explanation.[380]

In contrast to the generally beneficial effects the mediators had on recipients who continued to receive aid, the mediators had no identifiable

375. Bek-gran interview, *supra* note 243; Brown interview, *supra* note 266.

376. Bek-gran interview, *supra* note 243; Van de Grift interview, *supra* note 235. Welfare rights organizations are currently active in the Milwaukee, Racine-Kenosha, and Madison areas. An embryonic welfare rights organization is operating at a low level in the Fox River Valley, covering mainly Fond du Lac and Winnebago counties. Bek-gran interview, *supra* note 243.

377. RAND MCNALLY & CO., 1976 COMMERCIAL ATLAS & MARKETING GUIDE 567.

378. Bek-gran interview, *supra* note 243.

379. *Id.*

380. The lesson future researchers should draw from this difficulty in interpreting the data from urban counties is that *a priori* aggregations should be examined carefully before implementing the research plan.

TABLE 11
SUCCESS RATES: RURAL SOUTH*

	PERIOD:	1965-68	1969-73	1974	1975-76
(ROW)	SUCCESS RATES: ISSUES				
(1)	Overall: Sufficiency	68.67	28.67	33.33	25.00
(2)	Overall: Supplemental	0.00	11.11	36.36	---
(3)	Overall: Reduction	50.00	50.00	27.27	44.44
(4)	Overall: Termination	40.00	64.29	47.06	50.00
(5)	Overall: Entry Denial	46.15	50.00	51.85	45.45
(6)	Overall: Average	47.45	42.86	42.35	41.18
(7)	Hearing: Sufficiency	50.00	30.00	50.00	33.33
(8)	Hearing: Supplemental	0.00	12.50	22.22	---
(9)	Hearing: Reduction	33.33	50.00	22.22	33.33
(10)	Hearing: Termination	61.54	50.00	71.43	25.00
(11)	Hearing: Entry Denial	75.00	50.00	57.14	75.00
(12)	Withdrawal: Sufficiency	81.82	100.00	20.00	---
(13)	Withdrawal: Supplemental	---	0.00	100.00	---
(14)	Withdrawal: Reduction	100.00	---	100.00	75.00
(15)	Withdrawal: Termination	0.00	100.00	42.86	100.00
(16)	Withdrawal: Entry Denial	42.86	50.00	75.00	66.67

* *See* note to Table 9 for a description of the types of data presented in this table.

effect on the success of recipients whose benefits were terminated or applicants whose requests for admission to the AFDC program were denied. Termination appeals throughout the southern counties of the state were less successful after 1973 than they had been between 1969 and 1973, although the decreased success rate is not traceable solely to the presence of mediators.[381] This decline might well be due to policy changes at the statewide level tightening eligibility and removing much of the caseworkers' discretion.[382] Conversely, entry denial appeals had

381. For example, the success rate of termination appeals from urban counties remained constant from 1969-74, and then dropped by about 50% when mediators were removed. *See* Table 10, row (4). Rural termination appeals dropped when mediators were introduced, but continued at that level after mediators were withdrawn. *See* Table 11, row (4).

382. In Wisconsin, this occured in 1974 when the state shifted to a "flat grant" system. *See* Appendix C.

Lower discretion has been something of a nationwide trend since *Goldberg*. *See, e.g.*, Lupu, *Welfare and Federalism: AFDC Eligibility Policies and the Scope of Staff Discretion*, 57 B.U.L. REV. 1 (1977).

stable success rates for the most part and seemed to be unaffected by the presence or absence of mediators.[383]

Termination appeals in Milwaukee followed a much different pattern from those of other counties. When mediators were present in 1974, the percentage of successful termination appeals fell dramatically, then rose to its 1969-73 level when mediators were withdrawn. Most of the decline in the success rate was due to an increase in no-shows in 1974, which rose from a negligible level to nearly one-third of all termination appeals in 1974.[384]

In conclusion, the effects of mediation in 1974 varied according to the issue raised on appeal and the county from which the appeal originated. While the mediators failed to increase withdrawals, they did tend to raise success rates for recipients raising sufficiency, supplemental, and reduction issues. However, success rates for termination and entry denial appeals were unaffected by the presence of mediators. Possible explanations for the observed effects of mediators will be discussed in Part V.[385]

V. The Wisconsin Fair Hearing System—Implications and Evaluations

The effects of the change in hearing procedures and the presence of attorneys or mediators within the system were examined in Parts III and IV. This part of the study focuses upon the implications of those findings. The first section summarizes the evidence of inadequacies in the AFDC fair hearing system developed by the commentators and adopted by the *Goldberg* Court. Some of the underlying factual assumptions behind the system are then called into question. The second section discusses the value of various suggested methods of supplementing the hearing system to achieve a more accurate, useable process.

A. Inadequacies of the Current Fair Hearing System

When the commentators recommended changes in the fair hearing system, changes which the Court later adopted, an implicit understanding of how the clients, agencies, and hearings functioned in relation to one another existed. The basic feature of the recommended changes was the extension of procedural due process rights to clients using the fair hearing system.[386] The basic goal was to make the hearing process an effective tool whereby clients could assert their rights under the AFDC program.[387] If the kinds of safeguards adopted were effective in achieving this goal, the data gathered should have shown increases in overall client suc-

383. *See* Tables 9-11 at row (5).
384. *See* Table 8, row (12), columns (2)-(4).
385. *See* notes 449-58 *infra* and accompanying text.
386. *See* notes 53, 104-13 *supra* and accompanying text.
387. *See* notes 300-05 *supra* and accompanying text.

cess,[388] the filing of requests,[389] and the use of hearings following a request.[390] Such impacts should have been most evident among clients who have been denied or terminated from the receipt of benefits.[391]

The data gathered, however, show a considerable decrease in overall client success.[392] For issues of termination and entry denial, the rate at which agency determinations were appealed did increase but remained at a very low level.[393] While the percentage of appeals settled informally decreased, the overall proportion which actually resulted in a contested hearing did not correspondingly increase.[394] Instead, the proportion of appeals resulting in a no-show increased dramatically.[395]

Generally, therefore, the present hearing system has not been as useful in correcting erroneous eligibility determinations as its proponents had hoped. In order for evaluation and criticism to be helpful, however, they must go beyond such a general conclusion and attempt to identify the reasons for this result. The data alone cannot provide answers to such an inquiry. A combination of reasoning and information gathered through interviews with those who have dealt with the hearing system in many different capacities, however, can help to identify some possible explanations.

The elements of the hearing system are the clients, the agencies, and the hearings themselves. It is very difficult to isolate particular problems within one of the elements as a probable cause of the unforeseen results. Instead, the problem areas which appear to be the most likely sources of failure in the system arise in the interrelations of these factors. These potential problem areas are (1) the ability of the client to use the hearings, (2) the nature of the relationship between the client and the agency, and (3) the effectiveness of the hearings as a check on agency discretion.

I. CLIENT USE OF HEARINGS

One of the basic assumptions of the commentators was that clients would be able to use the hearings effectively.[396] In order to use a hearing, however, the client must know about the hearing and its procedures. Furthermore, the client must have sufficient understanding and skill to see how the hearing can operate to her benefit, and to express her position coherently in light of that analysis. Either or both of these requisites may be absent from the operation of the present hearings.

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388. *See* notes 306-07 *supra* and accompanying text.
389. *See* notes 311-13 *supra* and accompanying text.
390. *See* notes 308-10 *supra* and accompanying text.
391. *See* note 314 *supra* and accompanying text.
392. *See* Table 2 and notes 323-25 *supra* and accompanying text.
393. *See* note 344 *supra* and 475 *infra* and accompanying text.
394. *See* Table 3, text following note 333, and notes 328-29 *supra* and accompanying text.
395. *See* Table 3 and notes 330-32 *supra* and accompanying text.
396. *See* notes 65-66 *supra* and accompanying text.

The Court and commentators recognized that such knowledge of the availability of fair hearings and their procedures was essential when they stated that timely and adequate notice of the hearing opportunity must be provided.[397] Some doubt has been expressed, however, of the adequacy of the notice which is actually sent.[398] For whatever reason, clients have displayed a need for more information as evidenced by their turning to welfare rights organizations or legal services offices for guidance.[399] Moreover, the data on the effects of the reintroduction of mediators in 1974 show clients faring better when mediators were present.[400] Mediators, like welfare rights organizations or legal service offices, help to inform the clients of their rights.[401] Thus the study's findings lend circumstantial support to a conclusion that clients are inadequately informed.

The early commentators and the Court in *Goldberg* assumed that welfare clients were as capable as anyone else of understanding the issues presented on an appeal and of expressing clearly the facts in a light most favorable to their position.[402] Some commentators, however, pointed to the general lack of education and verbal skills of most clients as reason to suspect that this was not the case.[403] Any lack of skills which the client may have would be compounded by the formal nature of the proceedings and the difficult language of any regulations or IMM guidelines that she may be referred to.

There are two indications that clients do lack this basic understanding and skill. First, the absence of a complete and thorough presentation by a client often forces the hearing examiner to spend most of his time asking questions in an effort to fill in the gaps.[404] Second, the data on mediation circumstantially support the conclusion that clients are generally unprepared for the hearings and their procedures. The mediators helped the clients to develop their cases by asking the same sorts of questions the examiners asked and by informing the clients of the implications of their answers.[405]

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397. *See* notes 67, 103-04, 127 and 305 *supra* and accompanying text.

398. Hanson interview, *supra* note 266; Brown interview, *supra* note 266. Others felt that the notice was simply worded and adequate. Interview with Thomas Patterson, Hearing Examiner 1955-1977, in Madison, Wis. (Mar. 2, 1977) [hereinafter cited as Patterson interview].

399. Brown interview, *supra* note 266; Steinglass interview, *supra* note 266.

400. *See* notes 371-72 *supra* and accompanying text.

401. Bek-gran interview, *supra* note 243; Dow interview, *supra* note 251; Holton interview, *supra* note 248; Zimmerman interview, *supra* note 250.

402. *See* notes 65, 108-09 *supra* and accompanying text.

403. *See* notes 71-72 *supra* and accompanying text.

404. Patterson interview, *supra* note 398; Van de Grift interview, *supra* note 235.

405. Bek-gran interview, *supra* note 243; Dow interview, *supra* note 251; Holton interview, *supra* note 248; Zimmerman interview, *supra* note 250.

2. AGENCY/CLIENT RELATIONSHIP

The parties' behavior toward each other can affect the use and outcome of a hearing. If a client feels that a hearing request will be regarded as an attack upon the agency, she may be reluctant to file a request, especially where some benefits will still be received even if no hearing request were made. Moreover, the amount of adversity between the client and agency at the hearing could affect the positions, presentations, and outcome at the hearing.

Most caseworkers regard a hearing request as an assault upon their credibility,[406] but this may be changing.[407] Since virtually all clients intend to receive aid following their appeal, at least if successful,[408] there is a risk involved in every case. Even if there would be no benefits without a favorable hearing decision, it may only be a Pyrrhic victory for the client. If the caseworker has developed a dislike for the client, the client's stay on the welfare roll may well be short and will probably be unpleasant.[409] Even if such an adverse reaction would not actually oc-

406. Brown interview, *supra* note 266; Van de Grift interview, *supra* note 235.

407. Defensiveness may still be the reaction in rural areas, but in Milwaukee most of the caseworkers are former recipients and do not take requests for hearings personally. Steinglass interview, *supra* note 266. A hearing examiner found that caseworkers were defensive unless they had had a great deal of contact with the state agency. Van de Grift interview, *supra* note 235.

408. The overwhelming majority of appeals, if successful, would result in the client's receipt of benefits for which the agency had determined that she was ineligible. Within the issue factor, the categories of "sufficiency," "reduction," "termination," "entry denial," "supplemental," "slow processing," "procedural," "non-financial," and "other" were identified. Significant numbers of appeals appeared in the first five categories but the remaining categories accounted for less than 3% of the appeals. This is very significant because the first five issues involve complaints about the inadequacy or nonreceipt of benefits whereas the remaining issues involve complaints about other aspects of the program. The costs of requesting a hearing consist of inconvenience, anxiety, and strain upon the ongoing relationship between client and agency as well as the financial and mental expenditures necessary to prepare for and participate in the hearing. *See* notes 73, 164-67 *supra* and accompanying text. Thus, clients appear much more likely to risk the costs of requesting a fair hearing when their benefits are at stake than when their treatment by the agency is questionable.

There are several possible explanations for this phenomenon and only an identification of the possibilities—not a conclusion—is attempted here. These other issues may be capable of being dealt with outside of the hearing process. If a client does not like the way she is being treated, her most effective approach may be to talk to the agency employee involved or the employee's superior. On the other hand, if such informal methods are ineffective, it may appear to the client that satisfactory relief cannot be obtained through a hearing. A hearing decision may not change the kind of treatment she receives, and her relationship with the agency may be adversely affected. Unless the treatment is especially egregious or the kind of treatment received is very important to her, it may not be worthwhile to pursue such a claim since the most she can hope for is some slightly different treatment at the hands of a less friendly agency. A final explanation may be that such issues, even if they could be successfully appealed without adverse consequences, are not important to people struggling with the problems of poverty. For a finding that such views are held see note 75 *supra* and accompanying text.

409. The stay may be short because a determined caseworker may find some colorable reason for terminating the client's benefits, or the client may simply leave the program by

cur,[410] it is the client's fear of it that is the deterring factor. There is, therefore, a built-in disincentive to file an appeal. This deterrent is substantially increased, however, when the client is also jeopardizing the receipt of benefits which will continue without a successful appeal. The client in that case is risking both the existing benefits and any additional benefits gained at the hearing.

In addition to fears arising spontaneously on the part of the client, the caseworker may be able to exert considerable influence over a client's decision whether to appeal a determination. This is more likely in areas where a close agency/client relationship exists.[411] The caseworker may be able to convince the client not to file a hearing request or not to follow through on one that has been filed.[412] Regardless of whether the caseworker is correct in his actions or is intimidating the client, the hearing system has been subverted when such pressure is exerted and the potential for abuse exists. Such abuses cannot be solved through the hearing system and thus may continue to frustrate the goals of the Court and commentators.[413]

Even where a hearing does occur, the agency/client relationship can affect the conduct and hence the result of the hearing. Because of the concern over jeopardizing the relationship, the client may be hesitant to state her case as strongly as possible. The result would be a less persuasive presentation and possibly an unwitting compromise of her position. Similar constraints do not apply to the agency since the relationship is basically one way, with the client in the dependent posture.

At approximately the same time as the hearing procedures were

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moving to another county or state. Continuance of the relationship can become unpleasant because there are many ways in which a caseworker can make life difficult for the client; the most obvious way is the unannounced home visit late at night. *See* Handler & Hollingsworth, *Reforming Welfare*, *supra* note 28, at 1173-74, 1176, 1178.

410. There is some indication, however, that while caseworkers' immediate reaction is usually defensive they do not retaliate after the hearing decision. Brown interview, *supra* note 266.

411. A close relationship is more likely in rural counties, where welfare recipients are likely to be scattered throughout the communities. Because of the low population in rural counties, agency personnel are likely to have known recipients before they began receiving AFDC benefits. Further, the small number of clients and caseworkers in such counties makes it easier to establish a close relationship. While some might consider this type of system more likely to create abuses needing correction, it is not the type of setting in which procedural safeguards are necessary to avoid the injustices of a detached, often faceless bureaucracy. Thus one would expect the anticipated benefits of the formal procedures to be less evident in these counties. To the extent that relatively little change among the periods is present in the data, this supposition is borne out. The relatively high win rate in rural counties could be a product of such pressures since only relatively assertive clients would ever file an appeal. *See* Table 2.

412. In some cases the caseworker will urge an appeal so that a "wrong" policy can be changed. Van de Grift interview, *supra* note 235. But they may be discouraged from doing so by their supervisors. Brown interview, *supra* note 266.

413. Other mechanisms may not be more appropriate, however, for addressing this problem. *See* notes 462-74 *infra* and accompanying text.

changed, there was a general change in the agencies' approach to the client. Before the change, the agencies combined the AFDC grants with the provision of other services whereas afterwards they separated these roles.[414] This meant that the distribution of money no longer served as part of the agency's paternalistic efforts at rehabilitation of the client but rather as a mere ministerial fulfillment of the client's entitlement.[415] The result of this switch in attitude was probably a hardening of positions at an earlier stage and a tougher stance at the hearing.[416]

This change in agency attitude toward a more adversarial posture could work to the detriment of the client as compromise becomes less likely and the hearing becomes more adversarial.[417] Where matters used to be handled informally, it may now be difficult to obtain redress in any manner other than a hearing request. Such a development would mean that some meritorious claims will not be pressed and hence not satisfied. At the same time, nonmeritorious claims may be entering the hearing process rather than being quickly disposed of. The combination could result in abortive attempts to press nonmeritorious claims and would account for a drop in the success rate and an increase in the no-show rate such as occurred in 1969.[418]

3. HEARINGS AS CHECKS ON AGENCY DISCRETION

The Court and some commentators had hoped that hearings would serve as a deterrent to erroneous eligibility determinations.[419] In practice, however, it is very difficult for hearings to serve this purpose. The decisions are not fully reported and so can not serve as a guide to caseworkers who do not find out about the result in some other way.[420] Even if they were reported and indexed, however, their great number, in combination with the caseworker's heavy work load, would effectively

414. Interview with James Honnold, Chief of County Administration, Madison Region, District Supervisor (1964-69), in Madison, Wis. (Feb. 18, 1977) [hereinafter cited as Honnold interview].

415. *Id*. *See* Lurie, *Major Changes in the Structure of the AFDC Program Since 1935*, 59 CORNELL L. REV. 825, 847-48 (1974).

416. The agencies now consider their role in the AFDC program to be the making of factual determinations of eligibility. Such determinations are likely to produce more clear-cut opinions which are less likely to be reconsidered by the agency.

417. *Cf*. WIS. ADMIN. CODE § PW-PA 20.18(2)(b) (defining hearing as a continuation of the administrative process and not an adversary proceeding).

418. *See* Tables 2 & 3 and notes 323-25, 419-21 *supra* and accompanying text.

419. *See* Handler, *Justice*, *supra* note 17, at 18; Wickham, *supra* note 28, at 66-67. *See also* notes 62-63, 103, 153-55 *supra* and accompanying text.

420. The full decision is kept on file at DHSS-DFS. Indexed summaries of the decisions are distributed quarterly in DEP'T. OF HEALTH & SOC. SERV., DIV. OF FAMILY SERV., SUMMATION OF FAIR HEARING DECISIONS. These summaries do not often provide much guidance to a caseworker with a similar problem since the factual summary does not normally give any specifics; only general statements of the issue and holding are given. Since the full decision exists only in the Madison office of DHSS-DFS, it is impossible for the caseworker to look up the full decision. Therefore, the summaries presently given are not very useful in this respect.

prevent research on all but the most important cases. Moreover, hearing examiners operate within specified geographical areas.[421] Inconsistencies among them are possible,[422] making any potential deterrent effect vary among areas. Also, even if a reversal by a hearing examiner is an effective deterrent for the particular caseworker involved,[423] the chances of a similar case arising in the short tenure of most caseworkers[424] is small. Thus, the hearings' ability to serve as a deterrent has been largely nullified by the practical aspects of the system and some agencies may be tempted to follow a rather defiant policy.[425]

Part of the process of the switch in agency approach to the provision of benefits may have been the emergence of agency use of hearings as a substitute for negotiations with clients. There could be several reasons for an agency's reluctance to settle disputes informally with a client. First, the agency may simply be taking a hard line, refusing to alter its position until formal action is taken. Second, it may have decided that it is more time efficient simply to go to hearings which have a limited duration than to enter potentially protracted negotiations with all complaining clients.[426] Third, the agency may not reach a settlement because the issue involved is too complex.

This issue complexity could arise from an inability to derive the correct answer from the statute, regulations and IMM.[427] Alternatively, the county agency may correctly determine that the situation is not covered by the existing laws and policies. It may then be unwilling to change its policy choice without an order from DHSS-DFS to do so. If the law and policy are either ambiguous or nonexistent, a hearing is neces-

421. Buehler interview, *supra* note 235.

422. Even if indexed decisions were available to the examiner, there might not be sufficient time or inclination to develop a sort of *stare decisis* among the examiners. There are also no provisions for administrative review other than general supervision.

423. The individual caseworker is supposed to be deterred through a combination of pride, peer pressure, and fear of discharge. Where he has acted arbitrarily and against accepted policy that may be the case. But if the caseworker is following a *county policy* which is at variance with state policy, he has nothing to fear. His supervisors and peers would agree with his position. His pride would not be wounded either because he was doing what he thought best or because he actually agreed with the hearing result but felt compelled to follow the county policy.

424. Caseworkers rarely remain with the program for more than a couple of years. *See* Handler & Hollingsworth, *Reforming Welfare* supra note 28, at 1177. This turnover may be causing the emergence of a secondary role for the hearing examiner—educating caseworkers on matters which used to be caught by county and state supervisory personnel. Hanson interview, *supra* note 266; Patterson interview, *supra* note 298.

425. Suspicions have arisen that a few county agencies will continue to follow a policy that conflicts with state or federal law or policy even after several adverse hearing decisions. Bek-gran interview, *supra* note 243; Brown interview, *supra* note 266; Hanson interview, *supra* note 266.

426. Conducting a hearing consumes only an hour or so of the agency's time whereas conferences with the client may take just as long or longer and still not reach a conclusion.

427. In some situations the caseworkers contact the local welfare rights organization for an explanation of the IMM, *supra* note 30. Brown interview, *supra* note 266.

sary so that state policy may be further developed. Although some hoped that hearings could be used to change policies,[428] the Court and commentators may not have envisioned substantial initiation of hearings through agency action. This is, therefore, a possible oversight in the current hearing system.

B. Possible Supplements to the Hearing System

The previous section outlined many of the inadequacies of the current hearing system. This section addresses the potential for improvement presented by various supplements to the basic system. Discussion focuses first upon those supplements which have been present from time to time in Wisconsin and which have been part of the appeals process—representation and prehearing mediation. The uses of mechanisms existing outside the hearing system but affecting the administration of the welfare program—"quality control" (a random sampling of eligibility determinations by the state agency) and welfare rights organizations—are then evaluated. Finally, the potential values of ombudsmen for welfare clients are assessed.

1. REPRESENTATION: THE VALUE OF ADVOCACY

One of the rights provided by the *Goldberg* Court was the right to be represented at the hearing by someone of the client's choosing.[429] It was assumed that such representatives would normally be attorneys,[430] but they could also be social workers, welfare rights organization members, or simply friends of the client.[431] The Court declined to require, as some commentators had urged[432] and HEW was about to provide,[433] that public funds be made available to compensate such representatives under the fourteenth amendment.[434] Thus, only those who pay for representation themselves or who qualify for some publicly funded legal assistance program are able to exercise their right to have an attorney with them at their hearings.

Even if free legal assistance were made available as a matter of right, the record of clients with attorneys during the periods studied indicates that little benefit would be gained. The success rates for those with attorneys were not much higher than for those representing themselves.[435] The only substantial difference between these two groups was that clients

428. *See* note 60 *supra* and accompanying text.
429. *See* note 110 *supra* and accompanying text.
430. *See* Graham, *supra* note 28, at 912-14; Handler, *Justice*, *supra* note 17, at 32; Reich, *Individual Rights*, *supra* note 27, at 1252; Scott, *Administrative Responsibility*, *supra* note 28, at 299; *Sparer*, *supra* note 28, *passim*; Wickham, *supra* note 28, at 52, 63.
431. 45 C.F.R. § 205.10(a)(3)(iii) (1976).
432. *See* note 57 *supra*.
433. *See* note 81 *supra*.
434. *See* note 110 *supra*.
435. *See* Table 6 and text following note 354 *supra*.

with attorneys appeared to be more successful at hearings, whereas self-represented clients were often successful through negotiations with the agency.[436] The effectiveness of attorneys at hearings[437] may result from attorneys proceeding to hearings with claims which could have been won through negotiation. However, if those with attorneys actually are more successful at the hearings there may well be some advantage to making attorneys available once the possibility of informal solution is past.

The data may not be an accurate forecast of the effectiveness of attorneys provided as a matter of right. Private attorneys are often very unfamiliar with the welfare program and therefore less effective.[438] MLS attorneys are experienced in AFDC matters but only accompany a client in situations where success is unlikely.[439] It is reasonable to postulate, therefore, that more client success could be obtained if attorneys experienced in welfare law represented clients at hearings. Such an experienced cadre of advocates might develop[440] if representation were provided by the state to all clients. The question arises, however, whether state provision of attorneys is worth the substantial extra cost. The supposed benefits of such a group of lawyers could, however, be realized in a less expensive and perhaps more effective manner.[441]

There are three basic reasons for having an attorney representing a client at a hearing. First, the attorney can provide the client with information and advice concerning the strength of her claim and how best to proceed with the claim. An attorney who is not experienced in AFDC matters will not be able to provide these services fully. One need not be an attorney, however, to gain the kind of knowledge and experience which is of use to the client. The mediators[442] and members of welfare rights organizations are good examples of this.

The second reason for having an attorney is his skill in making arguments upon the facts and law as they apply to the client's situation. This is important not only because the arguments will be made more persuasively, but also because important facts are less likely to be skipped

436. *See* Table 6 and text accompanying note 351 *supra*. *See also* Appendix A, series 2.

437. If Hearings-Won are divided by the sum of Hearings-Won, Hearings-Lost, and No-shows in order to get the success rate for non-negotiated settlements, the rates for those with attorneys is 48.3%, whereas the rate for those who were alone is 32.49%. *See* Appendix A, series 2. *Cf.* Table 6 at col. 3 (negotiated settlements included in a similar calculation).

438. Bek-gran interview, *supra* note 243; Van de Grift interview, *supra* note 235. But as a group they still have a better record than MLS or self-represented clients. *See* text following note 358 *supra*.

439. *See* note 356 *supra*.

440. If most of the representation were done by private attorneys through the Judicare program, such expertise might not develop. Given the trend toward specialization within the profession, however, it seems likely that a few members of the bar would eventually handle the bulk of the cases.

441. Much of this proposal was inspired by some comments made during the Bek-gran interview, *supra* note 243.

442. *See* notes 372-73 *supra* and 461 *infra* and accompanying text.

than when the client attempts to present the case and the hearing examiner has to develop the facts himself.[443] In the context of a hearing the lawyer's skill comes primarily from an understanding of the rules and regulations and how they structure the issues in the case. A lawyer has also developed skills in factual analysis and logical presentation which are helpful to his client's case. Both the understanding of the applicable law and the analytical and organizational skills of the attorney, however, could be developed by nonlawyers specializing in welfare hearings,[444] possibly with some initial guidance from legal services attorneys. The lawyer's unique skills in the rules of evidence, which make him indispensable at a trial, are not required at the hearing since the hearing is not subject to formal courtroom procedures.[445]

The third use of the attorney is as a buffer between the client and agency during the hearing. In addition to providing moral support to a hesitant client, the lawyer can make strong charges against the agency or caseworker and bear the brunt of much of the animosity that is created. The attorney can also protect the client from having to respond to embarrassing or unfair questions which are irrelevant. These functions, however, can also be performed by someone without formal legal training.

Nonlawyer advocates trained and experienced in the law of welfare hearings should be able to perform these functions as well as attorneys. There would be several advantages to using these nonlawyer advocates. The amount of gamesmanship presently interjected by attorneys at hearings[446] should be reduced. Nonlawyer advocates would theoretically be more prepared for the specific case and more knowledgeable of hearing policies and procedures than attorneys presently are. They are therefore less likely to use tactics which are designed to obscure the issues and which probably annoy hearing examiners.[447] Untrained in the formal rules of evidence, these nonlawyer advocates should be more comfortable in a hearing which does not observe these rules.

The use of nonlawyer advocates would also place less strain on public assistance budgets. These advocates could be salaried at a substantially lower level than even beginning attorneys. They could be even more effective buffers between the client and agency because the client

443. Bek-gran interview, *supra* note 243; Van de Grift interview, *supra* note 235. *See* note 101 *supra* and accompanying text.

444. For example, some welfare rights organization members become effective advocates at hearings even though they have no legal training. Van de Grift interview, *supra* note 235.

445. If the client wishes to overturn a regulation, she will have to do so through court action for which an attorney would have to be obtained.

446. Attorneys often begin sparring with the agency and its witnesses, if any, through cross-examination and similar trial techniques, especially when they are unfamiliar with the law and facts of the case. Van de Grift interview, *supra* note 235.

447. *Id.*

would not have actively procured them, they would simply be part of the process. They may be inclined to stay at their positions longer than young attorneys seeking advancement within the profession. Being in such a specialized area, these advocates would acquire an expertise more rapidly and would eventually become even more expert than all but the most dedicated welfare lawyer.

The disadvantage to the use of a staff of nonlawyer advocates, of course, is the danger that their constant contact with the hearing examiners and agencies will cause them to develop too much sympathy for the agency or state position. Concessions may be made in some cases so that others may benefit, and potentially meritorious claims might be lost or never pursued as a result. This danger may not be avoidable when close and continuous contact is necessitated by a steady stream of new cases. Recruitment of people with strong pro-client leanings and constant reminders of the danger may be the only effective ways to attempt to deal with these problems. In any event, the same danger would be present if the advocates were attorneys.[448]

2. MEDIATION: THE VALUE OF INFORMATION TO CLIENTS

The effect of mediators on client success shows that for certain issues hearings often fail to identify meritorious cases and that recipients with meritorious claims often withdraw unsuccessfully. When mediators are present, considerably higher success rates are observed for sufficiency, supplemental, and reduction appeals.[449] Clients appealing these issues are more successful regardless of whether they proceed to hearing or withdraw their requests.

The most likely explanation of this increase is that the mediator provided the client with information while the mediator was questioning the client in order to evaluate her case. The mediator explained to the client which policies cover her situation, what the relevant facts were, and whether she had a good case.[450] Such information was invaluable to the recipient with a meritourious claim,[451] for it gave her the basis for the arguments she had to make to prevail, either at a hearing or during negotiations with the local agency.

The increased success rate for recipients going to hearings lends support to this explanation. When the recipient went on to a hearing, she went without the mediator, and usually without any representation. Yet

448. The clearest example of this problem is in the indigent criminal defense program where it is feared that public defenders will plea bargain one defendant's case in order to maintain a rapport with the prosecutor which may be useful in another defendant's case.

449. *See* notes 363-84 *supra* and accompanying text.

450. Dow interview, *supra* note 251; Bek-gran interview, *supra* note 243; Zimmerman interview, *supra* note 250; Holton interview, *supra* note 248.

451. "Meritorious claim" will be used here to describe claims that a neutral observer with all the relevant facts of the claim would resolve in favor of the recipient.

the success rate for hearings on sufficiency, supplemental, and reduction issues rose when mediators were present. The only difference in the hearing procedure was that a mediator had intervened and explained to the recipient what facts were relevant to her case. Without such assistance recipients may often have been unable to present an adequate case, and the hearing examiner would not have had sufficient time to develop the relevant facts of such cases.[452] With the mediators' help, recipients could apparently state the facts cogently enough for the hearing examiner to determine whether the local agency had applied state policy correctly.

Mediators served a somewhat different role in increasing the percentage of successful withdrawals. The rise in withdrawal successes, coupled with the overall increase in client success, indicates that without mediators many meritorious cases are being withdrawn unsuccessfully.[453] The main effect of the mediators on withdrawals was that their intervention reduced withdrawals of these meritorious cases. The data of this study, unfortunately, is insufficient to determine exactly how the mediators achieved this result; however, there are two possible explanations. First, the mediator may have obtained information from the client which conclusively proved that the agency was wrong. When the mediator brought this information to the attention of the local agency, the agency often responded by approving the client's request.[454] If this accurately describes how mediation functioned, then the mediators increased client success by facilitating communication between the county agency and the client.

A second explanation is that mediators changed the procedural disposition of appeals. The mediator may have been sending meritorious cases which would ordinarily have been withdrawn on to hearing, which the recipient then won. At the same time, he may have been persuading the agency to acquiesce in the demands of other clients who would have gone on to hearing had those demands not been met. Under this explanation, the result of the mediator would be the same as under the previous explanations: both hearing and withdrawal success rates would increase.

These explanations represent two separate theories, but the real

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452. This conclusion, though drawn largely from interpretation of the data, closely follows two factors noted elsewhere. First, the inability of recipients to present an effective case has been noted by people involved with the hearing process. Bek-gran interview, *supra* note 243; Van de Grift interview, *supra* note 235. *See* notes 44-45, 171-72 *supra* and accompanying text. Second, the hearing examiners are under tremendous time constraints. Hearing examiners usually hold hearings on Friday, and hear between eight to ten cases. They therefore have little time to develop the facts of an obscure or poorly presented case. Patterson interview, supra note 398; Van de Grift interview, *supra* note 235. It is reasonable to infer that the two factors combine in the manner described by this explanation.

453. *See* note 372 *supra* and accompanying text.

454. Bek-gran interview, *supra* note 243; Holton interview, *supra* note 248; Zimmerman interview, *supra* note 250. *But see* note 375 *supra* and accompanying text (Dane county agency tends to appeal rather than accept recipient request).

explanation is probably a combination of both. The important point is not, however, that one or the other explanation is exclusively correct, but rather that the mediators prevented certain types of withdrawals which through some mechanism increased overall recipient success.

The preceding discussion does not apply, however, to the effect of mediators on termination and entry denial appeals. The success rates for these issues remained steady or declined throughout the 1969-76 period. The difference between the effect of mediators on the success rates of termination and entry denials and their effects on the success rates of issues concerning the continuation of benefits probably lies in the allocation of the burden of proof required of the local agency or the client. When a hearing is requested to review termination or entry denial decisions the caseworker is required to explain why the aid was terminated or denied.[455] The hearing examiner thus does not have to develop the relevant facts from an inarticulate or uninformed client. Instead, he can simply ask the client whether the facts the caseworker has alleged are true. Mediators should have little effect on such cases. They were more successful in dealing with sufficiency, supplemental, and reduction appeals because those issues required a full development of relevant facts in order for the hearing examiner to understand the appeal. For termination and entry denial, the hearing examiner is not at such a disadvantage.

A similar analysis follows for withdrawals of termination and entry denial appeals. Assuming that the error is obvious, a client usually can understand the caseworker's reasoning enough to argue her case to the agency effectively, and mediators provide no advantage to the client in developing the facts.

By contrast, the client challenging sufficiency, supplemental, or reduction decisions has the burden of proof to show that she is entitled to additional benefits.[456] This kind of appeal requires the client to develop her entire case by herself. If, as often seems to be the case, the client raises an issue that is not specifically covered by the county manual, the

455. The *Goldberg* decision requires adequate notice to the client explaining the policies on which the agency has based its action. *See* notes 105-06 *supra* and accompanying text. Presumably the caseworker would be forced to substantiate his or her decision at the time the notice was sent.

456. The agency must, of course, give notice of its reasons for denying sufficiency or supplemental claims. *See* note 122 *supra*. However, the client filing a sufficiency or supplemental appeal is challenging agency inaction, which often involves areas not covered by the county manual. Bek-gran interview, *supra* note 243; Brown interview, *supra* note 266; Steinglass interview, *supra* note 266. Thus the agency can simply state in its notice that the client's claim is not supported by the IMM, *supra* note 30, which does not aid the client in developing her case. Developing a case in an area without clear precedent requires that the client argue in favor of her interpretation. Unless she has the relevant facts and a good idea of what policy should apply, this can be quite difficult.

Although for reductions the agency must provide notice similar in details to the notice required for terminations and entry denials, *see* note 455 *supra*, reduction appeals in Wisconsin have certain unique characteristics which will be described later. *See* Appendix C.

caseworker will probably deny her request. To present an effective case for an issue not covered by the manual requires a fair degree of sophistication, something that most clients lack. Additional client resources are needed for a client to make such a case. It is not surprising, therefore, that mediators serving as an information resource for AFDC recipients should have had more impact on these issues than on more clearly defined issues such as eligibility determinations, where the caseworker had to justify his or her actions.

The final consideration in evaluating the effectiveness of the mediators in 1974 is whether they could have been even more effective in reducing hearing error and accelerating withdrawals. The mediators failed dramatically to decrease the percentage of hearing requests resulting in hearings.[457] At the same time, more clients won their hearings, which suggests that some of them might have withdrawn had the local agency agreed to grant the clients' requests. Had the mediators had the authority to order the county agency to accept the client's request whenever the mediator felt the county was wrong, the mediators might have been even more effective.[458] It is, of course, impossible to predict from the available data that such authority would necessarily produce the desired results. Nevertheless, it seems reasonable to speculate that a more active and powerful mediator could achieve the twin goals of fewer and more efficient hearings while assuring that meritorious cases are not erroneously dismissed or withdrawn.

Finally, it should be noted that replication of the procedures used by the Wisconsin mediators in 1974 and 1975 may not be necessary to insure that meritorious cases not be decided erroneously by hearing examiners or withdrawn unsuccessfully by clients. The cause of the mediators' success was threefold: they intervened rapidly and prevented premature withdrawal,[459] they were independent from the local agency and for that reason were trusted by the clients,[460] and they knew and understood the substantive regulations governing the AFDC program and could therefore provide clients with high-quality information about their appeals.[461] As long as these conditions are met, other methods of state intervention could produce similar results. Alternative types of state intervention and their weaknesses will be discussed in the next section.

3. LESS ADVERSARIAL ALTERNATIVES

The Wisconsin data on representation and mediation suggests the possibility that adversarial hearings can be made more effective for the

457. *See* notes 365-69 *supra* and accompanying text.
458. This would have the effect of making the mediator an informal hearing examiner.
459. *See* notes 453-54 *supra* and accompanying text.
460. Brown interview, *supra* note 266.
461. The mediators were members of the regional staff of DHSS-DFS and thus were familiar with welfare regulations and policy. *See* notes 243-53 *supra* and accompanying text.

clients who somehow manage to find their way into the hearing system. Nevertheless, some critics believe that only less adversarial, more informal procedures can accomplish what the *Goldberg* hearings have failed to do.

One proposal is that more informal contacts be encouraged between the local agency and the aggrieved client, rather than rely on confrontation in the hearing.[462] The main drawback of this approach is that it returns to the pre-*Goldberg* situation where local agency discretion was largely unchecked, however imperfectly, by fair hearings.[463] Unless AFDC clients were a well-organized lobbying group,[464] it is difficult to see why local agencies would now engage in productive informal negotiation, since they would clearly continue to have the upper hand and have no incentive to spend time negotiating.

Another proposal suggests that only a comprehensive quality control program[465] used in conjunction with hearings can achieve the desired levels of accuracy.[466] Quality control does offer at least one improvement to existing hearing systems: if the quality control figures are used to detect and correct local policies or practices resulting in unacceptably high levels of error, the system does not have to rely on chance requests for hearings as a check on local agency discretion. However, if the figures are not used as part of a statewide program to curb local errors and abuses, the advantages of such quality control are much less clear.[467]

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462. *See* notes 215-17, 220 *supra* and accompanying text.

463. *See* notes 25-81 *supra* and accompanying text.

464. *Cf.* note 209 and text accompanying note 193 *supra* (possible ways of organizing client lobbying effort).

465. Quality control is "[a] system for monitoring the performance of personnel and the quality of end products." Mashaw, *The Management Side of Due Process*, *supra* note 150, at 791. Wisconsin's AFDC quality control system exemplifies state quality control programs. Quality control personnel in the regional DHSS-DFS offices take statistical samples of new and ongoing cases. They evaluate the case *de novo*, verify the facts underlying the case independently, and visit the client at her home. The focus of the program is on eligibility and correctness of the level of payments. Hanson interview, *supra* note 266.

HEW is becoming increasingly concerned with the use of quality control in the state administration of AFDC. *See generally HEW Efforts to Reduce Errors in Welfare Programs: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. (1976); *AFDC Quality Control Programs: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. (1975). *See also* HOUSE COMM. ON GOVERNMENT OPERATION, ADMINISTRATION OF THE AFDC PROGRAM, 95th Cong., 1st Sess. 202-51 (Comm. Print prepared by Cong. Res. Serv. 1977).

For comparison of the Wisconsin AFDC program with quality control programs in the administration of other social welfare benefits, see Mashaw, *The Management Side of Due Process*, *supra* note 150, at 791-803.

466. *See generally* Mashaw, *The Management Side of Due Process*, supra note 150.

467. Wisconsin's quality control program also highlights this weakness of existing programs. The random survey of cases focuses only on those people who are already receiving benefits. This means that termination and entry denial cases, decisions which if erroneous involve the greatest hardship, are not examined in the quality control program. Furthermore, a study underway at the University of Wisconsin indicates that feedback to local

A third possibility periodically proposed is the ombudsman concept. Ombudsmen are independent governmental monitors of governmental activity, without decisionmaking power but with full powers of investigation. They have full authority to investigate citizen complaints, reach conclusions about the propriety of the government's action, suggest alternatives to the action, and, if necessary, publicize their findings.[468] The perceived advantage of ombudsmen is that they can respond quickly to citizen complaints, while avoiding the hostility that confrontation between the citizen and the agency often causes. By avoiding this confrontation, ombudsmen's impartial advice is felt to be more likely to be followed.[469]

The ombudsman concept has three possible difficulties in the welfare setting. First, any ombudsman faces the same problem that any hearing system has in getting people to voice their dissatisfaction with current policies. Most proponents of ombudsmen think they would be less imposing to people affected by governmental action than a formal hearing would be.[470] Even if this is true, there is still the problem of informing AFDC clients of the ombudsman's existence and what he can do for them. Ombudsmen are not common in America, even in middle class institutions, and it may be that the average client may find the concept incomprehensible.[471]

Two additional problems that plague the ombudsman concept relate to the ombudsman's place within the welfare bureaucracy. First the ombudsman is a member of an interconnected state and local welfare bureaucracy whose duties are not only to give the proper level of assist-

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agencies is minimal. Researchers attribute this to heavy caseloads and limited supervision of caseworkers. Interview with Thomas J. Corbett, Specialist, Institute for Research on Poverty, University of Wisconsin, in Madison, Wis. (Sept. 16, 1977). For the general problems of using quality control data, see Mashaw, *The Management Side of Due Process*, *supra* note 150, at 803-04.

Although replacing hearings completely with a comprehensive quality control program has not been proposed, it should be noted that such an action would raise difficult questions of equity. Such a quality control program might reduce future errors, but it would still leave some current errors uncorrected. Because quality control is based on a sample of cases, it cannot uncover every error. If quality control replaced hearings, those clients who would be harmed by erroneous agency action and would not be discovered by quality control would thus be foreclosed from any relief, even if they were willing to appeal. Quality control therefore appears to be a potentially desirable complement to but not a replacement for hearings.

468. BLACK'S LAW DICTIONARY 1238 (4th rev. ed. 1968); W. GELLHORN, WHEN AMERICANS COMPLAIN 9-10 (1966); Hazard, *The Ombudsman: Quasi-Legal and Legal Representation in Public Assistance Administration*, in SOCIAL WELFARE AND URBAN PROBLEMS (T. Sherrad, ed. 1968); Moore, *Ombudsman and the Ghetto*, 1 CONN. L. REV. 244, 245 (1968).

469. W. GELLHORN, supra note 468, at 201-04. *Cf.* note 158 *supra* and accompanying text (one benefit of adversarial hearings is willingness of participants to accept results).

470. *Id.*

471. A study of ombudsmen in Nassau and Buffalo counties in New York found that the middle class used the ombudsmen far more often than did the poor. Moore, *supra* note 468, at 248.

ance to the eligible but also to deny benefits to the ineligible. The latter may result in the ombudsman developing an "us against them" mentality in favor of the local agencies.[472] This tendency may be reduced if the ombudsman is a member of the state agency and has some role in supervising the local agencies, but it remains a potentially serious problem. The second and final problem is that ombudsmen are usually powerless to stop abuses they discover. Even if he is independent, an ombudsman without power is of questionable value to the aggrieved client,[473] except possibly as a source of information. If the ombudsman only provides information, it should at least be asked if there are not more effective ways of disseminating information to the AFDC recipient.[474]

All of the above alternatives might be used to supplement the existing hearing process to provide an effective check on local agency discretion. However, it is important to note that none of these alternatives is likely to be successful on its own or without close coordination with the hearing system.

4. SUMMARY

The major difficulty with adversary hearings following the *Goldberg* requirements is that unassisted clients are usually poor adversaries. The Wisconsin data on fair hearings seems to negate fears that AFDC clients can never become effective adversaries. With knowledgeable representation or with an explanation of the pertinent facts and policies, they seem to do a creditable job of prosecuting their claims. Thus, complaints that adversarial hearings are inherently inadequate are premature, provided clients receive adequate support and information about their claims.

This sanguine view applies only to the cases which actually reach the hearing system. The mechanism by which a client chooses to request a hearing is at best poorly understood. It is entirely possible that formal hearing procedures intimidate many clients who are victims of agency error or abuse. Certainly there is a great discrepancy between the large number of errors discovered by quality control and the much smaller

472. This tendency has been observed in other areas of welfare administration. *See, e.g.*, notes 210-14 *supra* and accompanying text.

473. The ombudsman must rely primarily on moral persuasion, the "power to suggest backed by the appeal to the convention of propriety." Hazard, *supra* note 468, at 122-23. Such persuasion no doubt serves some value in itself, and might discourage some local welfare officials from abusive action. Considering the history of local welfare administration, however, it is difficult to be sanguine about the potential effectiveness of ombudsmen.

474. For example, it is unclear why ombudsmen should produce better results than mediators. *See* note 457 *supra* and accompanying text. In fact it is not even clear that either ombudsmen or mediators would provide better information than nongovernmental groups, such as welfare rights organizations. If dissemination of information is the key to enabling clients to protect their rights, the question is simply who can provide the best information at the least cost.

number of appeals.[475] It remains for future empirical research to establish who appeals adverse welfare decisions and why. However, this study has demonstrated that adversarial hearings are capable of producing accurate results, even though the circumstances necessary for accuracy have rarely been present in hearing procedures.

VI. Conclusion

The Social Security Act of 1935 provided for administrative hearings at the request of clients aggrieved by agency actions affecting their benefits.[476] By the 1960's, it had become clear that the hearings then in effect were insufficient to protect clients from arbitrary or erroneous agency action.[477] Legal commentators began to propose that certain changes be made so that clients who were not receiving the benefits to which they were entitled could effectively assert their claims.[478] The most prominent feature of their plans was the extension of due process rights to the receipt of benefits requiring that a requested hearing be held before benefits were changed. Certain basic due process procedures such as the right to be represented and to confront the agency's witnesses were thereby included. Their efforts culminated in the United States Supreme Court decision of *Goldberg v. Kelly* in which due process rights were held to apply to the termination of AFDC benefits.[479]

This study of AFDC fair hearings in Wisconsin for the years 1965 to 1976 was designed to investigate the impact of the changes wrought by the *Goldberg* decision upon the appeals of clients. The data gathered showed a decrease in client success and an increase in hearing no-shows following the change in procedures.[480] It also indicated that the present haphazard manner of attorney representation has not been helpful.[481] The brief introduction of state personnal as mediators at prehearing conferences did not change the method of disposition of appeals. Instead, they served as a means of informing and assisting clients so that some clients could make more effective use of the hearings.[482]

If the goals of the changes in 1969 are to be achieved, the results of this study indicate that certain supplements to the present hearing system must be made. First, some sort of pre-hearing contact should be made with each complaining client so that easily disposed of cases can be handled without a hearing, and, more importantly, so that the client can go to the hearing adequately prepared.[483] Should this not prove to be

475. *See* note 342 *supra* and accompanying text.
476. *See* note 2 *supra*.
477. *See* notes 26-50 *supra* and accompanying text.
478. *See* notes 52-70 *supra* and accompanying text.
479. *See* notes 84-119 *supra* and accompanying text.
480. *See* notes 316-34 *supra* and accompanying text.
481. *See* notes 349-62 *supra* and accompanying text.
482. *See* notes 363-77 *supra* and accompanying text.
483. *See* notes 449-61 *supra* and accompanying text.

sufficient, the state could also consider the provision of nonlawyer advocates for all clients carrying their appeals through to a hearing.[484] Finally, consideration should be given to the use of some form of selective screening of adverse eligibility determinations which are not appealed by the client, to make sure that rights are not unwittingly or fearfully lost. Such screening could occur through the existing quality control procedures or through independent bodies such as ombudsmen or even welfare rights organizations.[485] If none of these actions are taken, however, the welfare system will continue to deny benefits to those who are entitled to them.

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484. *See* notes 429-48 *supra* and accompanying text.
485. *See* notes 465-74 *supra* and accompanying text.

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